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1. Freight claims, U. S.

Ed





# **The Law of Loss and Damage Claims**

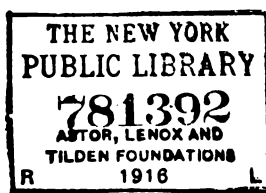
**Including the Cummins Amendment, Bill  
of Lading Act, Twenty-eight Hour  
Law, and Standard Claim  
Forms**

**By HERBERT C. LUST**  
of the Chicago Bar

**Author, Digest, Supplemental, and Quarterly Digest of Decisions  
Under the Interstate Commerce Act; The Workmen's  
Compensation Act of Illinois, Annotated;  
The Act to Regulate Commerce,  
Annotated, Etc**

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**CHRISTIAN F. WIEHE, Esq.**  
*this work is inscribed*

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## INTRODUCTION

Prior to the passage of the Hepburn Act of 1906 the liability of a carrier for loss and damage to freight was dependent only upon state law. Beginning with that year, the federal government has been putting in legislative form its complete jurisdiction over Interstate Commerce, so that at the present time there is hardly a question governing even loss and damage cases, but must be solved with reference to federal decisions.

The Carmack amendment of 1906 made the initial carrier liable for injury to a shipment no matter where caused. The Cummins Amendment abolishes all limitations of liability, and now recently, the Bill of Lading Act has still further occupied the field by defining more specifically the rights and liabilities growing out of the transfer and negotiation of the bill of lading. Since the bill of lading is filed as part of the tariffs and practically defines all the conditions governing the shipment, it is submitted, that when once the Interstate Commerce Commission approves a form of bill of lading, any question arising thereunder will have to be determined solely with reference to federal law. Indeed it would seem that such is the case at the present time, although some state courts hold that questions under the bill of lading, since no form has yet been approved or ordered to be adopted by the Commission, may still be determined by state law.

With the thought of federal supremacy in mind, the author has endeavored to cover the field of loss and damage to freight, selecting the state cases, from the viewpoint of the federal decisions, particularly the cases decided since the passage of the Carmack Amendment.

The book is prepared as a guide to the traffic man in the settlement of loss and damage claims. While care has been taken to support the various principles with citations of cases they are intended to be illustrative rather than exhaustive. An

endeavor has been made to examine the entire law and to state only such principles, as in the opinion of the author, will be sustained in the federal courts. It has been deemed advisable to emphasize by repetition certain important principles.

An attempt has been made to create a simple classification following the course that a shipment naturally takes. Thus, liability of the carrier when it first receives the shipment, liability during transit, and liability after arrival, seem to be the natural method of treating the subject.

In the appendix will be found printed the three federal laws with which Congress has occupied the field of loss and damage claims, namely, the Cummins Amendment, the Twenty-eight Hour Law and the Bill of Lading Act. Attention is called to the fact that on account of new legislation, which undoubtedly will be passed in the future and new decisions, the principles enunciated will necessarily change in course of time. The "Law of Loss and Damage Claims", will be kept down to date by quarterly supplements known as the "Loss and Damage Review." These, coming out every three months, will constitute a current quarterly text book of the law.

I desire to acknowledge the assistance of Mr. Norton F. Brand. My thanks are also due to the West Publishing Company for courtesies extended.

Chicago, Illinois, 1916

HERBERT C. LUST.

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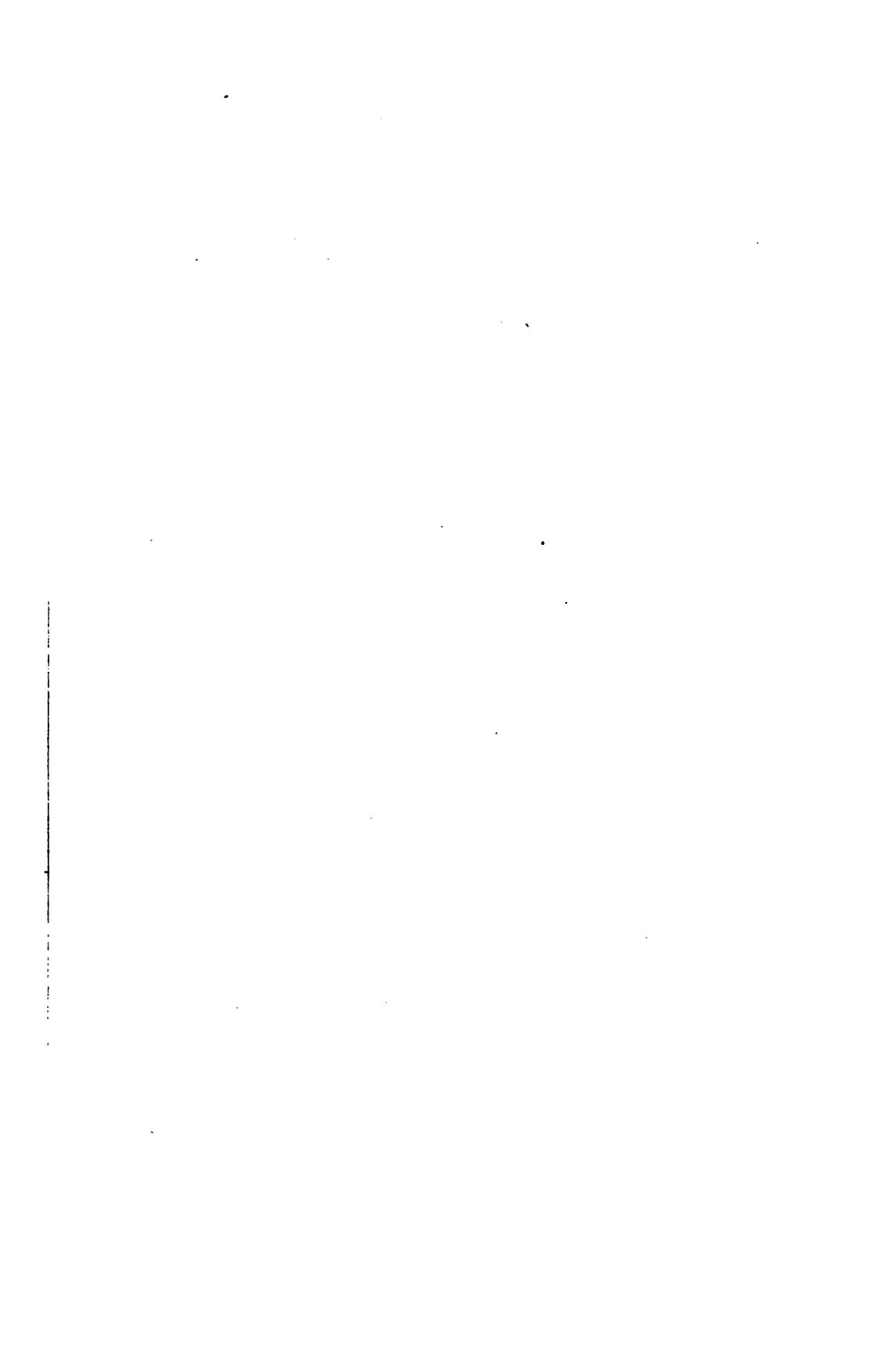
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# **THE LAW OF LOSS AND DAMAGE CLAIMS**



## I

### CONTROL AND REGULATION OF CARRIERS

1. **Federal Legislation.**
  - . **Effect of the Carmack Amendment.**
    - Construction in General.**
    - The Cummins Amendment in General.**
2. **State Legislation.**
3. **Determination of Status.**
  - Who are Common Carriers.**

1. **Federal Legislation.** Prior to the passage of the Carmack Amendment the different states had various rules for determining the liability of the initial carrier. Almost all the carriers issued bills of lading which restricted liability to their own lines. In some of the states, in spite of this limitation it was held that a carrier by accepting a shipment destined to a point beyond its line and issuing a through bill of lading therefor, was liable for the default of any connecting carrier. In other states the contrary rule was held. It may be stated therefore, that the prime, if not the only purpose of the Carmack Amendment was to make the initial carrier receiving property for interstate transportation liable to the lawful holder of a receipt or bill of lading issued therefor on account of any loss, damage, or injury to such property caused by it or by any other common carrier over whose lines the same might pass. Prior to that time the shipper or consignee was put to the trouble and expense of attempting to locate among those composing the through line of movement the particular carrier responsible for any loss or damage occurring to the shipment and of endeavoring to collect from it.<sup>1</sup> It was generally difficult and often impossible to definitely ascertain the

1. *Atlantic Coast Line v. River-side Mills*, 219 U. S. 186, 200; 55 L. Ed. 167; Sup. Ct. Rep. 164.

particular carrier in the through line which had caused the loss or damage, and it was the inadequate opportunity afforded under these conditions for enforcing justice that led to the enactment of this amendment of the law. It did not undertake directly to prescribe or limit the conditions or provisions of the bill of lading but operated to render void to the extent stated any attempted limitation of the liability of the initial carrier to the shipper.<sup>1½</sup>

**Effect of the Carmack Amendment.** It must be remembered that each state had its own particular statutes relating to the obligations of common carriers. In some, the statutes were very comprehensive and defined the rights of common carriers in detail. In others but few regulations were in effect. As soon as the Carmack Amendment went into effect in 1906 a conflict began between it and the legislation of the various states. It is, however, now well settled that the Federal statute is supreme,<sup>1¾</sup> and since the Act to regulate commerce and its amendments have gone into effect, cases for loss or damage must be decided in view of the provisions of that Act and its requirements that the carrier shall file its tariffs and rates, which shall be open to inspection, and shall prescribe rates applicable to all shippers alike, thus, to effect one of the main purposes of the law to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances.<sup>2</sup> Therefore under the

1½. *Louisiana State Rice Milling Co. v. M. L. & T. R. R. & S. Co.*, 34 I. C. C., 511, 512.

1¾. *Adams Exp. Co. v. Croninger*, 33 Sup. Ct. 148, 149, 226 U. S. 491; 57 L. Ed. 314.

2. *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S., 278, 59 L. Ed., 576, 35 Sup. Ct. Rep. 351, 353.

*Baldwin & Riggs v. Chicago R. I. & P. Ry. Co.*, (Ia. 1916), 156 N. W. 17.

*City of Newport v. Wagner*, (Ky. 1916), 182 S. W. 834.

*Louisville & N. R. Co. v. Price*, (Miss. 1916), 71 So. 161.

*Stubblefield v. St. Louis & S. F.*

*R. Co.*, (Mo. 1916), 184 S. W. 149.

*Olivit Bros. v. Pennsylvania R. Co.*, (N. J. 1916), 96 Atl. 582.

Where a petition in an action for damages for a railroad company's failure to comply with a stop-over provision in a contract for an interstate shipment of live stock showed that the subject matter of the cause of action was the breach of an interstate contract, the fact that the plaintiff deemed his action arose under the state laws will not preclude recovery under the federal laws, which have entirely superseded the state laws; there being no variance between the peti-



Carmack Amendment the subject of liability of a common carrier for loss or damage to an interstate shipment is entirely a federal question, and since this amendment does not specifically refer to an agreement limiting the liability of a carrier to an agreed valuation, for instance, but does supersede all state statutes on that subject,<sup>2½</sup> the validity of such an agreement is to be determined by common-law as declared by the federal courts.<sup>3</sup> Stated another way, since the Congress of the United States has, by section 20 of the Interstate Commerce Act of 1887, as amended by the Carmack Amendment, legislated directly upon carrier's liability for loss of or damage to interstate shipments, this legislation supersedes all regulations and policies and is supreme in this field.<sup>4</sup> It also embraces the subject of the liability of the carrier under a bill of lading which it must issue and limits its power to exempt itself by rule, regulation or contract.<sup>5</sup>

**Construction in General.** It applies to such so-called special contracts as live stock contracts, as well as other agreements for interstate transportation.<sup>6</sup> This statute therefore superseded

tion and proof. *Conley v. Chicago, B. & Q. R. Co.*, (Mo. 1916), 183 S. W. 1111.

A state may exercise power over the general subject of commerce where the power of the state is exclusive, and where the state may act in the absence of federal legislation, but where the subject is national in character, the action of Congress is exclusive; the state cannot interfere at all. *Blalock Hardware Co. v. Seaboard Air Line Ry. Co.*, (N. C. 1915), 86 S. E. 1025.

*Chicago M. & St. P. Ry. Co. v. Rock County Sugar Co.*, (Wis. 1916), 156 N. W. 607.

2½. *Spada v. Penn. R. R.* (N. J. 1914), 92 Atl. 379, 380.

3. *Adams Express Co. et al. v. Welborn*, (Ind. 1915), 108 N. E., 163, 164.

A question as to the carrier's responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of principles under the common law. *Southern R. Co. v. Prescott*, 36 Sup. Ct. 469, 473; 240 U. S. 632; 60 L. Ed.—

4. *W. H. Mitchell & Co. v. A. C. L. R. Co.*, (Ga. 1915), 84 S. E. 227; *Adams Exp. Co. v. Croninger*, 33 Sup. Ct. 148, 152, 226 U. S. 491; *Kansas C. S. R. Co. v. Carl*, 33 Sup. Ct. 391, 394, 227 U. S. 639.

5. *Thomas Bros. v. St. L. & S. F. Co.*, (Mo. 1915), 173 S. W. 96, 99.

6. *Armstrong v. I. C. R. Co.*, (Ky. 1915), 172 S. W. 947, 948; *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 61, 62.

not only all state legislation but even provisions of state constitutions.<sup>7</sup> It may be noted here the state courts hold the validity of a contract for an interstate shipment may be determined by either a state or a federal court, but only with reference to the Interstate Commerce Act as construed by the federal courts.<sup>8</sup> However, the Carmack Amendment does not invalidate an oral contract for the shipment of live stock.<sup>9</sup>

Again under the federal regulations governing interstate shipments, the carrier cannot, by mere stipulation in an independent contract, such as lease of an elevator, having no connection with the contract of shipment of the goods, relieve itself of its liabilities as a common carrier. It can do this only in the mode pointed out in such regulations, so that all shippers will be treated alike, which would not be the case if a carrier were allowed to absolve itself by a clause in a contract leasing a piece of property to the shipper.<sup>10</sup> An important thing to be remembered is that the Carmack Amendment is part of the substantive law of the land. Every contract of shipment is made with reference to this statute and its provisions may be invoked, when the proof shows its applicability.<sup>11</sup>

A great deal of confusion has arisen in several of the state courts, and occasionally a peculiar construction is given the statute, through fear that some federal right may be infringed. Thus in Georgia it was held, in an action against the last connecting carrier, to recover for damage to an interstate shipment, that the federal regulation contained in the Hepburn Act and the Carmack Amendment thereto is paramount and exclusive of state regulation,<sup>12</sup> and under the federal statute the initial carrier alone is liable for any loss, damage or injury to the shipment

7. *Adams Express Co. v. Cook*, (Ky. 1915), 172 S. W. 1097.

8. *K. C. & M. Ry. Co. v. Oakley* (Ark.), 170 S. W. 565, 566; *Adams Express Co. v. Cook*, (Ky. 1915), 172 S. W. 1097; *Dunlap v. Chicago & A. Ry. Co.*, (Mo. 1915), 172 S. W. 1178; *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 633, 636.

9. *Gulf C. & S. F. Ry. Co. v.*

*Vasbinder*, (Tex. 1915), 172 S. W. 763, 765.

10. *Morrison Grain Co. v. Missouri Pac. Ry. Co.* (Mo.), 170 S. W. 404, 407.

11. *Karr v. Baltimore & O. R. Co.*, (W. Va. 1915), 86 S. E. 43.

12. *American Brake Shoe & F. Co. v. Pere Marquette R. Co.*, 223 Fed. 1018, 1020.

caused by any transportation company over whose line the shipment might have passed.<sup>13</sup> Undoubtedly what the court intended to hold was that the first line, whether the bill of lading line or not, must be sued as the initial carrier. Very often small lines serving agricultural communities do not issue the bill of lading, but this is done by the trunk line with which they immediately connect. It has been the practise to entirely ignore the small carrier and file the claim against the line issuing the bill of lading as the initial carrier and sue it as such under the Interstate Commerce Act. But the weight of authority seems to be that in spite of the fact it issued the bill of lading it is not legally the initial carrier and cannot be held as such.<sup>13½</sup> It would follow therefore that since the Interstate Commerce Act imposes upon carriers the duty to issue bills of lading these small lines cannot delegate this duty to their immediate connecting carrier.

To hold that under the Carmack Amendment the initial carrier alone is liable is allowing the federal boggy altogether too much latitude. It is the overwhelming weight of authority that the state courts can entertain suits for loss and damage to interstate shipments. They can also construe the provisions of the Interstate Commerce Act, in this respect, of course, being governed by the federal construction. And suit can be brought against any carrier whatever.<sup>13¾</sup> The only difference between a case where suit is brought against the initial carrier and one where it is against a connecting carrier is this: in the former case when once it is proven the shipment is delivered to the originating carrier in good condition, and that it arrived damaged, or was lost, the case of the claimant is finished. The carrier is then absolutely liable unless it can show the loss was due to one of the excepted causes, such as an act of God, inherent nature of the shipment, fault of the

13. *Southern Ry. Co. v. Bennett*, (Ga. 1915), 86 S. E. 418.

13¼. *A. T. & S. F. Ry. v. Boyce* (Tex. 1914), 171 S. W. 1094.

A live stock contract made prior to the Cummins Amendment is not

covered by that statute. *Hudson v. Chicago, St. P. M. & O. Ry. Co.*, 226 Fed. 38, 44.

Also see Chapter V, 2, 3.

13½. *Hudson v. C. S. & P. M. & O. Ry.*, 226 Fed. 38.

shipper, or the like. In the latter case, where a connecting carrier is sued, not only must the claimant make out a case as mentioned, but, in addition, must prove the loss was due to the negligence of such connecting carrier. Thus, if the claim is for damage due to delay, the claimant must prove affirmatively the carrier sued did not transport with the necessary promptness, or delayed unreasonably at junction points, or at terminal was guilty of negligence, before it is liable. If the claim is for injury, then the claimant must affirmatively show the particular carrier was guilty of rough handling or some negligence which caused the injury. In other words, the burden of proof rests upon the shipper to show the negligence in a suit against a connecting carrier, whereas, in a suit against the initial carrier the law itself casts such a presumption upon it. It is interesting in this connection to call attention to the fact that suits against the delivering line are in many jurisdictions almost as simple as suits under the Carmack Amendment against the initial carrier. In these jurisdictions it is held that the law presumes each connecting carrier receives the shipment in the same condition as its predecessor. Therefore, once it is proven it was delivered to the initial carrier in good condition, it is presumed the delivering carrier received it in the same condition, and if it is delivered injured, then it is presumed the injury was caused by the last carrier. Of course, this carrier can relieve itself from liability, by proving it received the shipment in a damaged state.

**The Cummins Amendment in General.** The Carmack Amendment was amended by the Cummins Amendment, effective June 2, 1915. This statute superseded all the previous state decisions on limitation of liability. The Cummins Amendment rendered void the provisions theretofore carried in the bills of lading providing for the giving of notice and the filing of claims within a specified period. Most of the bills of lading had provided that notice of loss had to be given within a specified time. In live stock shipments, for instance, many of the carriers had provisions that notice of loss or damage had to be given in one day. Under the Cummins Amendment the shipper is given 90 days within which to give notice of loss, 4 months within which to file a claim, and 2 years within which to bring suit. It furthermore provides that if the loss, damage, or injury complained of

is due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence then no notice of claim or filing of claim shall be required as a condition precedent to recovery. Since it is very evident that in practically all cases for loss and damage, the carrier could not have been held unless the jury found it was negligent, shippers can now recover in all instances, even though no claim has been filed with the carrier. The only requisite would seem to be that where a claim has not been filed the shipper must plead negligence on the part of the carrier.

The Cummins Amendment is not a separate statute, but is an amendment to the Act. It must, therefore, be construed as a part of, and in connection with other portions of the Act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the Act other than that part known as the Carmack Amendment. The new amendment should, if possible, be so construed as to give full force to its clear purpose, without impairing the effect of any other provision of the Act.<sup>14</sup> It may also be noted the Cummins Amendment does not apply to export and import shipments to and from foreign countries not adjacent to the United States.<sup>15</sup>

**2. State Legislation.** It is impossible to say to what extent it will eventually be decided Congress has occupied the field of Interstate Commerce so as to render invalid state legislation. The trend of the decisions seem to be that all rights and liabilities growing out of the contract of transportation, as such, are to be determined solely with reference to the federal law.<sup>15½</sup> So a state statute imposing a penalty of \$50.00 on a common carrier for failure to adjust a claim for damages within 90 days on a shipment made within the state, and within four months in case of shipments from without the state, is rendered inapplicable by a rule of the Interstate Commerce Commission, providing that a carrier must dispose of a claim within six months.<sup>16</sup> In fact the

14. The Cummins Amendment,  
33 I. C. C., 682, 692.

15½. Adams Express Co. v.  
Croninger, 226 U. S. 491, 57 L. Ed.,

15 The Cummins Amendment,  
33 I. C. C., 682, 693.

314, 33 Sup. Ct., 148.

16. Morphis v. Southern Ex-

United States Supreme Court has decided Congress has so far occupied the field of transportation that a state statute providing for a penalty of \$50 against a terminal carrier for failure to pay promptly a claim for damages to an interstate shipment unless the carrier proves that the shipment never came into its possession or succeeds in shifting the blame for the loss within a prescribed period of 40 days, is unconstitutional.<sup>17</sup> Thus the law of South Carolina prescribing a penalty for failure to deliver freight upon payment of charges is annulled by the Interstate Commerce Act.<sup>18</sup>

On the other hand a statute of the state of Florida which undertakes to make it unlawful for any one to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption is valid, as such legislation only indirectly affects interstate commerce.<sup>19</sup> And a carrier is not liable for the loss of an interstate shipment of game shipped in violation of the law and seized and confiscated by the proper authorities.<sup>20</sup> So although Congress has the power to

press Co., (N. C.), 83 S. E. 1.

17. *C. & W. C. R. Co. v. Varnville F. Co.*, 237 U. S. 597, 59 L. Ed., 1137, 35 Sup. Ct. 715; *Trakas v. Southern Ry. Co.*, (S. C. 1915), 86 E. 492.

18. *Fennell Infirmary v. Southern Ry. Co.*, (S. C. 1915), 85 S. E., 237, 239.

19. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed., 835, 35 Sup. Ct. 501.

20. *J. L. C. & E. R. Co. v. Adams*, (Ark. 1915), 174 S. W., 527.

Where an agreement concerning further transportation over the line of a connecting carrier was made after the goods had reached the state of Arkansas, and they were only to be transported to another point in that state, the local laws govern. *Keithley v. Lusk* (Mo. 1915) 177 S. W. 756.

A shipment by one carrier be-

tween two points in a state, and by another carrier between a point in the state and a point in another state is, while transported by the first carrier, an intrastate shipment, where the shipment was made under local bills of lading, and where the second carrier transported the shipment free of charge by virtue of a contract between it and the shipper, the rights and liabilities of the first carrier are governed by state law, and not by federal law, *Kolkmeyer v. Chicago & A. R. Co.*, (Mo. 1916), 182 S. W. 794.

Until Congress has acted and passed laws regulating the recovery for breach of a contract for the delivery of an interstate telegram, the state courts are warranted in following their own laws. *Western Union Telegraph Co. v. Bailey*, (Tex. 1916), 184 S. W. 519.

regulate commerce among the several states, there are certain duties the performance of which by common carriers the state may impose under its police power, notwithstanding such carriers engage in interstate commerce; the states not having surrendered that power to the federal government.<sup>21</sup> A state is not prohibited absolutely from regulating interstate commerce but its powers are restricted only where Congress has exercised its power of regulation.<sup>22</sup> So a state enactment may be valid, though it incidentally affects interstate commerce, as where the enactment is an aid to such commerce, instead of a burden or interferes with it.<sup>23</sup> Hence there being no legislation of Congress on the subject, it is within the power of a state and of the state Railroad Commission thereof to require that trains though they be of interstate character, be moved from termini and junction points not more than 30 minutes behind the regular schedule, and on such schedule at all other stations, since, in so far as that requirement affects interstate commerce, it is in aid thereof; it being within the power of the state, in the absence of action by Congress, to exercise its police power in promoting the safe carriage of passengers on interstate trains.<sup>24</sup> And a state may provide for a moderate attorney's fee in suits on claims.<sup>24½</sup>

### 3. DETERMINATION OF STATUS.

**Who Are Common Carriers.** On account of the broad application of these new statutes, decisions defining who are common carriers become of increasing interest. All persons know railroads, express companies, steamships, and the like are common carriers. But there are many other persons who carry for hire, who, when a loss occurs, attempt an exemption of the insurer's liability which is inherent in the liability of a common carrier. It is on account of these instances, not so rare as one might sup-

21. *Missouri, K. & T. Ry. Co. v. Texas v. State*, (Tex. 1916), 181 S. W. 721.

22. *Missouri, K. & T. Ry. Co. v. Texas v. State*, (Tex. 1916), 181 S. W. 721; *Adams Exp. Co. v. Croninger*, 38 Sup. Ct. 148, 149, 226 U. S. 491; 57 L. Ed. 314.

23. *Missouri, K. & T. Ry. Co. of*

24. *Missouri, K. & T. Ry. Co. of Texas v. State*, (Tex. 1916), 181 S. W. 721.

24½. *M. K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 58 L. Ed., 1377, 34 Sup. Ct. 790.

pose, that renders a consideration of this topic of some importance. Whether a party is or is not a common carrier depends, in the last analysis, upon the facts concerning the business and the way it is conducted. If the carrier carries goods as a public employment, undertaking to carry goods for persons generally, and holds himself out to the public as ready to engage in that business as a business and not as a casual occupation, he comes within the definition of a common carrier.<sup>25</sup> So truckmen, wagoners, cartmen, porters and other persons who undertake to carry goods for hire for the public generally, and as a common employment in a city, are common carriers, and the fact that they have no regular tariff for their charges, but fix a special price for each job, does not change the relation.<sup>26</sup> Of course the test of whether the business is a public calling is whether there is indiscriminate dealings with the general public.<sup>27</sup> Therefore a wagoner who follows hauling for a livelihood, and advertises to the world that he will take goods of all persons indifferently for transportation from place to place, is a common carrier.<sup>28</sup> One important feature which distinguishes the legal

25. *Campbell v. A. B. C. Storage & Van Co.* (Mo. 1915), 174 S. W. 140, 141.

26. *Campbell v. A. B. C. Storage & Van Co.* (Mo. 1915), 147 S. W., 140, 141.

27. *Campbell v. A. B. C. Storage & Van Co.* (Mo. 1915), 174 C. W., 140, 141.

28. *Campbell v. A. B. C. Storage & Van Co.* (Mo. 1915), 174 S. W. 140, 141.

The operator of an incline for hire, who undertook to carry the cargoes of all vessels plying the river up the incline to the cars of a railroad company, was a "common carrier," *Joest v. Clarendon & Rosedale Packet Co.*, (Ark. 1916) 183 S. W. 759.

Even if an expressman, delivering packages and parcels in a local

district, be not strictly a common carrier, as to extent of liability, he by his contract of carriage agrees to use proper care and attention in carrying and delivering a parcel. *Astrella v. Laffey*, (Mass. 1916), 111 N. E. 681.

Where a transfer company which was chartered to engage in the business of the transportation and carriage of passengers, and their baggage, and other persons and goods, wares, and merchandise, between the various stations and other points in the city and counties, held itself out as ready to receive and transport all who applied for carriage and were ready to pay the compensation demanded, it was a common carrier with respect to its taxi-cab business, undertaking to carry persons and property gen-



status of the common carrier from the private carrier is that a private carrier has no lien for charges. This may often be an important difference, especially if a dispute arises over charges.<sup>29</sup>

erally, offering its services to all. *Carlton v. Boudar*, (Va. 1916), 88 S. E. 174, 175.

A local carrier, such as a cabman, wagoner, or transfer man, carrying passengers and baggage for the public generally, from place to place in and about a city, or from town to town, is a common carrier, and, in his relations with

his patrons, he is governed by the general legal principles applicable to carriers doing business on a larger scale. *Brown Shoe Co. v. Hardin*, (W. Va. 1916), 87 S. E. 1014.

29. *Campbell v. A. B. C. Storage & Van Co.* (Mo. 1915), 174 S. W. 140, 141.

## II

### BEGINNING OF LIABILITY

#### A. Delivery to the Carrier.

1. Issuance of Bill of Lading.
2. Recitals in Bill of Lading.  
—Shippers' Load and Count Provision.
3. Destruction Before Transportation.
4. Failure to Furnish Facilities.
5. Transportation Over Designated Route.

#### A. DELIVERY TO THE CARRIER.

1. **Issuance of Bill of Lading.** The liability of the carrier begins as soon as the goods are in its custody, but it is sometimes very difficult to determine when this has happened. The delivery must be complete so that the owner has parted with all dominion over the goods and nothing further remains to be done by him. Contrary to a very prevalent impression, the issuance of a bill of lading is not essential to subject the carrier to its liability. An oral contract is sufficient to charge the carrier. Very often delivery to the carrier may be constructive, that is, where a carrier is in the habit of receiving goods at a certain place without formal notice that shipments are awaiting transportation, its liability as an insurer may begin from the time the goods are put in such a position. This particular doctrine, however, must be applied with a great deal of caution. If by a course of dealing, it is the habitual practice and usage of the carrier to receive goods for transportation upon a private wharf or team track used exclusively by it, a deposit of the goods in the usual and accustomed manner may be regarded as a sufficient delivery.<sup>1</sup>

1. The issuance of a bill of lading is only evidence that the carrier has received and accepted the shipment for transportation. *Milne v. Chicago, etc., R. Co.*, 155 Mo. App. 465, 135 S. W. 85.

Occasionally disputes arises concerning the authority of a certain agent to issue a bill of lading. Section 22 of the Federal Bill of

- Cohen Bros. v. Missouri, etc., R. Co., 44 Tex. Civ. App. 1, 7.
- But the liability of a railroad as a common carrier begins immediately it receives the goods for shipment:
- Michie on Carriers, p. 292, citing the following cases:
- Bower v. Water Witch, Fed. Case, No. 197, 1971, 19 How. Prac. 241.
- Snow v. Carruther, Fed. Case, No. 13, 1441 Spr. 324.
- Alabama Mid. R. Co. v. Danby, 119 Ala. 531, 24 So. 713.
- Garner v. St. Louis, etc. R. Co., 79 Ark. 353, 20 R. R. 527, 48 Am. & Eng. R. Cas., N. S. 527, 96 S. W. 187, 116 Am. St. Rep. 83.
- Pine Bluff, etc. R. Co. v. McKenzle, 75 Ark. 100, 16 R. R. 50, 39 Am. & Eng. R. Cas., N. S. 50, 86 S. W. 834.
- Illinois Central R. Co. v. Smyser 38 Ill. 354, 87 Am. Dec. 301.
- Lord v. Maine Central R. Co., 105 Me. 255, 33 R. R. 130, 56 Am. & Eng. R. Cas., 130, 74 Atl. 117.
- Meloche v. Chicago, etc. R. Co., 116 Mich. 69, 74 N. W. 301.
- Aiken v. Chicago, etc. R. Co., 68 Iowa 363, 27 N. W. 281, 25 Am. & Eng. R. Cas. 377, 10 Am. & Eng. R. Cas., N. S. 82.
- Landes v. Pacific Railroad, 50 Mo. 346.
- Coyle v. Western R. Corp., 47 Barb. 152.
- Salinger v. Simmons, 57 Barb. 513, 8 Abb. Prac. N. S. 409, 2 Lans. 325.
- Berry v. Southern R. Co., 122 N. C. 1002, 30 S. E. 14.
- East Line, etc. R. Co. v. Hall, 64 Tex. 615.
- International, etc. R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.
- Roy v. Griffin, 26 Wash. 106, 66 Pac. 120.
- Parker v. Great Western R. Co., 7 M. & G. 223, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas. 563, 1 Ry. & C. T. Cas. 15.
- C. P. Ry. Co. v. Wieland, 226 Fed. 670.
- Where it is the custom of a railroad company when requested to place an empty car upon its sidetrack at a flag station to be loaded with cotton, and when loaded, to remove the car, and subsequently issue a receipt and bill of lading, the railway company is liable for the loss of cotton so loaded, if notice has been given by shipper of its destination, and that it is ready for removal, and nothing remains to be done by him before shipment; although no receipt or bill of lading has been given for the cotton, and the name of the consignee has not been furnished to the carrier. St. Louis, etc. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419. Also see:
- Deming v. Merchant's Cotton Press, etc. Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.
- Hernsheim v. Newport News, etc. Co., 18 Ky. L. Rep. 227, 35 S. W. 1115.

Lading Act which will be in effect January 1, 1917, provides that a carrier shall be bound by a bill of lading issued by any employee within the scope of his actual or "apparent" authority. Any innocent holder of such an instrument can recover against the

*Green v. Louisville, etc. R. Co.*  
163 Ala. 138, 50 So. 937.

*Central, etc. R. Co.*, 170 Ala. 627,  
54 So. 205, Am. Cas. 1912 D.  
965.

*Meyer v. Vicksburg, etc. R. Co.*,  
41 La. Ann. 639, 6 So. 218, 17  
Ann. St. Rep. 408.

*Whitehurst v. Texas, etc. R. Co.*,  
131 La. 139, 59 So. 42.

*Morrison Grain Co. v. M. P.  
Ry. Co.*, (Mo. 1915), 170 S. W.  
404, *Gulf, C. & S. Ry. Co. v.  
D. S. Cage & Co.* (Tex. 1915),  
174 S. W. 855.

It has been held that the failure of a carrier to move a carload of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault. *Green v. Louisville, etc. R. Co.*, 163 Ala. 138, 50 So. 937. But see *Central, etc. R. Co. v. Sigma Lumber Co.*, 170 Ala. 627, 53 So. 205, Am. Cas. 1912 D. 965.

A common carrier may, by special arrangement with a shipper or by implication through habitual custom and usage, agree to accept and receive goods for transportation placed along its line for shipment at places other than the regularly designated places for the reception and delivery of freight. *Gulf Coast Transp. Co. v. Howell*, (Fla. 1915), 70 So. 567.

On the other hand, it is held that

a carrier may limit its liability for loss from fire. To this, however, is added the important qualification that it cannot limit this loss where the fire is occasioned through its negligence or the loss is occasioned through its negligence. *Michie on Carriers*, p. 725, 953, 958, 970, 1020, 1021, 1022.

Under the Cummins Amendment, the liability of the carrier as an insurer commences when the property is delivered to it for transportation, and the liability of the carrier as such insurer cannot therefore be limited. Unquestionably the property is in the possession of the carrier when placed on the shipper's side-track and the carrier is notified to remove it and issues a bill of lading therefor.

Section 1 of the uniform bill of lading reads as follows:

"For loss, damage, or delay caused by fire occurring 48 hours (exclusive of legal holidays), after notice of the arrival of property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay

carrier although the bill of lading may call for more goods than the carrier has actually received.<sup>1½</sup>

**2. Recitals in Bill of Lading.** Bills of lading contain various provisions concerning quantity and quality of the goods. Thus the uniform bill of lading states that the shipment is received "in apparent good order." This recital is not conclusive, but it may be shown as a matter of fact, that the property was not in good order, and this may be proven by parole evidence. While it is true that certain courts have said the bill of lading is the contract of transportation, it is nevertheless, so far as the recitals concerning the quantity or quality of the shipment itself is concerned, only a receipt for the goods, and, as such, it may be explained, varied or contradicted, according to what are the true facts of the case. If, in fact the quantity stated has not been received, the carrier has a right to show this. Contradicting the recitals in the bill of lading so far as it acts as a receipt, is not varying the terms of a written contract, because so far as these

occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

It will be observed under this section of the bill of lading that

the carrier recognizes the right of the shipper to recover in case of fire except in two cases—one where the loss occurs subsequent to 48 hours after arrival at destination, and the other where the product is loaded on an open car.

1½. Although there is a conflict whether a carrier is liable on a fraudulent bill of lading, some courts holding that in the hands of an innocent purchaser, the carrier should be held liable, a very strong case has recently held that a false bill of lading, given by a station agent for goods not actually received was not within the scope of his authority and conferred no rights. *Fitch & Co., v. A. T. & S. F. Ry.*, 155 N. Y. S. 1079, and see, *Churchill v. Grand Trunk Western Ry.* (Mich. 1915), 154 N. W. 106., *Guaranty Trust Co. v. M. & O. R. R.*, (Miss. 1916), 70 So. 585.

recitals go, the bill of lading is looked upon as a receipt rather than as a contract. But while parole or other evidence is admissible to show the true quantity of goods shipped or their true quality, such evidence is not admissible to vary the terms of the bill of lading so far as it acts as a contract of transportation. Two reasons may be assigned for this. One is that the conditions of the bill of lading are carried in the filed tariffs of the carriers, and under the Interstate Commerce Act, are binding upon both the carrier and shipper. To permit the conditions of the bill of lading to be varied, would therefore, be sanctioning a special contract, which is prohibited by the Federal law. The other view is that the bill of lading is a written contract, and it is inadmissible to vary the terms of such a contract by exterior evidence.

**Shipper's Load and Count Provisions.** Very often a bill of lading contains a notation such as "shipper's load and count." This means the shipper has loaded and counted the contents of the car. In case of shortage, it is often contended that the carrier is not liable because of this notation. Such is not the case. If the shipper, by competent testimony, such as its loading clerks, can show what has been received, the carrier must make good the difference. And the bill of lading is always prima facie evidence of what has been shipped. The recent Bill of Lading Act which will go into effect January 1, 1917, covers this situation thoroughly, and clears up any ambiguity which might exist, although it is not probable that the Supreme Court of the United States would ever have held that the words "shipper's load and count" relieved the carrier of liability for any shortage. At the most, it would seem that this provision in a bill of lading is only evidence that the shipper has loaded the car, and in the event any damage is suffered, due to defective packing or loading, the carrier could not be held responsible. Therefore this legislation has only placed in statutory form what should have been considered the prior law. The pertinent provisions of the Act are as follows: "Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the

bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading. **Provided, however,** Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted con-

trary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."<sup>2</sup>

**3. Destruction Before Transportation.** One of the most vexing classes of loss and damage claims arise in those cases where a shipment is destroyed before it has actually begun to move. For instance, property which is still on the shipper's side track awaiting transportation. There are many cases where shipments of this kind have been destroyed by fire. To render the carrier liable it is not always necessary that a bill of lading has been issued. Perhaps the weight of authority is to the effect that where

2. In the case of *Ponchatoula Farmers' Asso., Limited v. I. C. C. R. R. Co.*, 19 I. C. C. 513, the Interstate Commerce Commission refused to make any recommendation concerning the practice of receipting for shipments at shippers load and count; although it intimated that the practice might not be unreasonable as applied to shipments of perishable produce.

This is significant in view of the fact that the Commission has jurisdiction over the provisions of bills of lading governing interstate shipments.

*Moore on Carriers* (2nd. ed.) says: (192 et seq.)

"It is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and it cannot, generally, devolve this duty by any regulation upon the shipper; it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars.

*London, etc., Fire Ins. Co. v. Rome, etc. R. Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225, affg. 68 Hun (N. Y.),

App. 231.

*Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408.

Where by the contract of carriage, the shipper undertakes to load the freight into the cars or vessel, this does not constitute such an interference by the shipper with the carrier's exclusive possession and control as to postpone the time when the carrier takes on the character of a common carrier, and the carrier's liability attaches at the time the freight is offered for carriage and accepted, although the loading of the freight remains to be done by the shipper.

*London, etc., Fire Ins. Co. v.*

*Rome, etc., R. Co.*, supra;

*Fitchburg, etc., R. Co. v. Hanna*,

12 Mass. (6 Gray) 539, 66 Am.

Dec., 427; *Merritt v. Old Col-*

*ony, etc., R. Co.*, 93 Mass. (11

Allen) 80; *Bulkley v. Naum-*

*keag Steam Cotton Co.*, 24

*How. (U. S.)* 386, 16 L. Ed.

599; *The Bark Edwin*, 1

*Sprague (U. S.)*, 477, *The Ore-*

*gon, Deady (U. S.)*, 179; *Grant*

*v. Norway*, 2 Eng. L. & Eq.

337, 10 C. B. 665, 70 E. C. L.

665, 15 Jur. 296; *Greenwood v.*



carrier has been notified that a carload shipment is on the shipper's side track ready for transportation and the carrier agrees to transport the car, its liability as an insurer begins after a reasonable time for it to take the shipment ends, so that, if in the interim between the expiration of such time and the issuance of the bill of lading the shipment is destroyed, the carrier is liable as an insurer.<sup>3</sup> This is especially true since the Carmack Amendment, although it provides the carrier should issue a receipt or bill of lading for property received for transportation, nowhere says the liability of such carrier shall not attach until such bill of lading has been issued.<sup>4</sup> Damages are recoverable against a railroad company for breach of a verbal contract to furnish cars for the shipment of live stock on a day certain, though a bill of lading is subsequently executed.<sup>5</sup> In another case a shipper delivered cotton to a compress for

Cooper, 10 La. Ann. 796. Hannibal, etc. R. Co., v. Swift, 79 U. S. (12 Wall) 262, 20 L. Ed. 423."

It is of course elementary that the recitals as to quantity contained in the bill of lading are only prima facie, and may be shown to be incorrect in fact. Practically however, if the shipper uses care in loading and has the carload properly checked by some competent person who can make affidavit as to the exact contents, it is impossible for the carrier to overcome the recitals in the bill of lading. If just before the car is turned over to the railroad, or the railroad notified that it is ready for delivery, a checker examines the car, so that he can make affidavit as to the number of sacks which it contains and immediately his inspection is finished, he signs a memorandum, and retains this for the shippers' files under these circumstances, it would be impossible for the carrier to successfully controvert any

claim for overcharge, or the like which might subsequently be made on that particular car.

On account of the wide spread practice of the carriers in requiring shippers of carload commodities to count their freight, it is problematical whether the Commission would issue an order changing this practice, although it may be the absolute duty of carriers, upon request, and irrespective of what the practice is, to count freight and issue a receipt for the exact amount of commodity tendered for transportation.

It seems that the stamping of the words, "shippers load and count," on the bill of lading, is a useless procedure, and does not effect the substantial legal rights of the shipper.

3. See *infra*, p. 132.

4. *Morrison Grain Co. v. Mo. Pac. Ry. Co. (Mo.)*, 170 S. W. 404, 407.

5. *Pecos & N. T. Ry. Co. v. Stinson*, (Tex. 1916), 181 S. W. 526.

compression and delivery to a carrier, which issued a local bill of lading to the port. Subsequently the shipper asked to have this bill of lading cancelled and an export bill of lading issued by the connecting carrier whose rails did not reach the compress point. The cotton was destroyed by fire while at the compress point. It was held there having been no delivery to the carrier which issued the export bill of lading and no act of it having contributed to the injury, it was not liable for the same.<sup>6</sup> But, as

Damages for breach of carrier's contract to deliver cars at orchard for shipment of peaches is not to be limited to cost of hauling the fruit to the depot, where it does not appear that it could and would have been cared for if taken there, but rather the contrary. *Texas & N. O. R. Co. v. Weems* (Tex. 1916), 184 S. W. 1103.

A local agent has authority to make a verbal contract binding his company to furnish cars for the transportation of cattle on a day certain. *Pecos & N. T. Ry. Co. v. Stinson* (Tex. 1916), 181 S. W. 526.

6. *Texarkana & Ft. S. Ry. Co. v. Brass*, (Tex. 1915), 175 S. W., 778.

Moore on Carriers, (2nd ed.), p. 192, states the following rules:

"It is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and it cannot, generally, devolve this duty by any regulation upon the shipper; it cannot, legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars." Citing,

*Lounon, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225, affg. 68 Hun (N. Y.),

598, 23 N. Y. App. 231; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408; *St. Louis, etc., R. Co. v. Martin* (Tex. Civ. App.), 35 S. W. 28.

Of course it is a very customary thing for shippers to load freight. This is particularly true of car-load traffic which is invariably loaded by the shippers. If once a car is set for loading the shipper naturally desires to place his shipment into it and have the car moving as soon as possible. Modern efficiency demands that the movement of freight be expeditious and hence it is a very common occurrence for the carrier to place an unloaded car, the shipper to load it, and the carrier to take possession of the car and have it actually in transit, before any bill of lading is issued.

Moore further says, p. 192, et seq:

"Where, by the contract of carriage, the shipper undertakes to load the freight into the cars, or vessel, this does not constitute such an inference by the shipper with the carrier's exclusive possession and control as to postpone the time when the carrier takes on the character of a common carrier, and the carrier's liability attaches at the time the freight is offered

stated, an originating carrier is liable over to a trunk line carrier which has issued its bill of lading for the transportation of a

for carriage and accepted, although the loading of the freight remains to be done by the shipper.

London, etc., Fire Ins. Co. v. Rome, etc., R. Co., *supra*; Fitchburg, etc., R. Co. v. Hanna, 72 Mass. (6 Gray), 539, 66 Am. Dec. 427; Merritt v. Old Colony, etc., R. Co., 93 Mass. (11 Allen) 80; Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S. 386, 16 L. Ed. 599. The Bark Edwin, 1 Sprague (U. S.), 477; The Oregon, Deady (U. S.), 179; Grant v. Norway, 2 Eng. L. & Eq. 337, 10 C. B. 665, 70 E. C. L. 665, 15 Jur. 296; Greenwood v. Cooper, 10 La. Ann. 796.

The carrier's liability is not necessarily affected by the fact that the shipper loaded his own goods.

Hannibal, etc. R. Co. v. Swift, 79 U. S. (12 Wall.), 262, 20 L. Ed. 423.

The carrier is responsible for any injury to the goods occurring while they are being loaded into the cars, where the shipper has not undertaken or contracted to load them for himself.

Merritt v. Old Colony, etc., R. Co., 93 Mass. (11 Allen), 80; Gilbert v. N. Y. Cent., etc., R. Co., 4 Hun (N. Y.), 378, 6 Thomp. & C. (N. Y.) 662; Whitman v. Western Counties R. Co., 17 Nova Scotia, 405; Thomas v. Ray, 4 Esp. N. P. 262.

A shipper who to save charges or for his own convenience, or any other reason, loads the property himself is not the agent of the carrier in so doing, and the latter is not responsible for his negligence in loading the car.

Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215, 9 Am. & Eng. R. Cas. N. S. 556 revg. judg. 65 Ill. App. 145."

If the car is in the custody of the shipper it would be at the best only a bailment of the car to him for the benefit of the carrier. In some jurisdictions he would only be compelled to take slight care of it. In others he would be compelled to use ordinary care in taking care of the car. Ordinary care is simply that measure of precaution which the average man would take of property entrusted to him under similar conditions. The fact that the car stood on a public siding is strong evidence to show that as a matter of fact it was not in the custody of the shipper, but was in the custody of the carrier. If the public siding was right along-side of the factory it would be a question of fact to be deduced from all the circumstances of the case in whose custody the car was. If, however, the public siding was not along-side the factory and not on the grounds of the factory, then the car unquestionably would be in the custody of the carrier.

Under such circumstances, the shipper would be under no obliga-

shipment which the originating carrier is to switch to the bill of lading line for the principal haul and which was destroyed by fire while still on the shipper's switch tracks.<sup>7</sup> But the duty of a carrier of live stock begins when the stock is delivered into its receiving pens for shipment.<sup>8</sup>

**4. Failure to Furnish Facilities.** Not all losses prior to transportation occur while the shipment is in cars. A distinct class of claims are those which are caused by the failure of the carrier to furnish cars by a specified time, or to keep on hand suitable facilities for taking care of the shipment while awaiting transportation. The latter class of cases peculiarly apply to live-stock. Carriers maintain pens at many shipping points, in which the livestock is confined while waiting for cars to arrive. Some times these pens are dirty and hence disease breeders, by reason whereof the livestock become infected. Sometimes the pens are in bad repair and the livestock break through and get lost. Sometimes the pens are too small and the livestock get crowded in them and injured. It is the duty of a carrier of live stock to keep its receiving pens in reasonably safe condition to hold cattle offered for shipment until they can be loaded, considering the ordinary conditions attending cattle in such situation and their ordinary habits and propensities.<sup>9</sup> And a railroad can de-

tion to safeguard the car and would only be liable for a direct act of negligence on his part. That is, if one of his workmen negligently left a can of burning gasoline near the car so that it took fire, or something of that kind. Even with the car in the shipper's custody he should be charged only with ordinary care in protecting the same; and lack of such care would not be shown by the mere fact that the car took fire while on his siding, or on his property. The question of what is negligence is a question for the jury in all cases.

7. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.*, (Texas 1915),

174 S. W. 855.

8. *Hardesty v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1915), 179 S. W. 725.

9. *Hardesty v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1915), 179 S. W. 725.

A carrier of live stock could not escape liability for damage through its having placed the stock in an infected yard for resting and watering during transit, though the putting in the yard was the only means available to the carrier to avoid violating the federal statute, requiring rest, watering and feeding transit. *Nashville C. & St. L.*

cline to accept a shipment of live stock by showing that, at the time of tender of shipment, its stockyard, where, by federal statute, it was required to put off stock for resting, watering, and feeding in transit, was infected with a contagious disease, which condition the carrier did not have reasonable time to remedy.<sup>10</sup>

A railroad company engaged as a common carrier in the shipment of any particular class of articles or property, is bound to furnish suitable cars for such shipments, upon reasonable notice whenever it can do so by the exercise of reasonable diligence and fairness and impartiality to all its patrons.<sup>11</sup> But where a

Ry. v. Farrell & Braley, (Ala. 1916) 70 So. 986, 987.

Where a railroad's agent informed the agent of shippers of live stock, who desired to avoid unloading for resting and feeding, as required by the federal statute, that the shipment might be made from a particular town to avoid unloading, it was no acceptance of such offer to ship the stock from a town in another state on a through bill of lading, containing no such stipulation, issued to another agent of the shippers, as consignor, by another carrier, as initial carrier, and without notifying defendant railroad, and, without agreement with it that the step would be taken. Nashville C. & St. L. Ry. v. Farrell & Braley, (Ala. 1916), 70 So. 986.

Where defendant railroad knew or had notice that its stockyard was infected with a contagious disease in time to have remedied the condition or to have provided another place for feeding, watering, and resting live stock in transit, as required by the federal statute, but nevertheless, received stock for transportation, which being put off in the infected yard, contracted the disease, and was damaged, the

road was liable. Nashville C. & St. L. Ry. v. Farrell & Braley, (Ala. 1916), 70 So. 986, 987.

Where the shippers of live stock from a point in Kentucky informed the agent of a connecting carrier at a point in Tennessee, on the day before the initial carrier delivered the shipment to the connecting carrier, that such connecting carrier's stockyard at Nashville, was infected, the information was sufficient to put the connecting carrier on inquiry as to the condition of its yard, rendering it negligent on its part to unload the shipment in such yard for feeding and watering, as required by the federal statute, without investigation. Nashville C. & St. L. Ry. v. Farrell & Braley (Ala. 1916) 70 So. 986, 987.

10. Nashville, C. & St. L. Ry. v. Farrell & Braley, (Ala. 1916), 70 So. 986, 987.

11. McNeer, Talbot & Johnson v. Chesapeake & O. Ry. Co., (W. Va. 1915), 86 S. E. 887.

Damages for alleged failure to furnish sufficient cars to transport cane will not be allowed where the cane lost by freezing was never offered or delivered at the place designated in the contract. Since

shipper of strawberries knew that an express company was prepared to receive and ship all truck tendered, but not on train 42, though as an accommodation to him, occasionally, a few berries

the shipper had no right to assume in advance that cane tendered at the switch would not be accepted and transported but the matter should have been tested by tendering delivery especially if some previous shipments had been transported. *Landry v. J. M. Burguières Co.* (La. 1916) 70 So. 875.

Requiring an interstate railway company to furnish cars to shippers within a reasonable time after demand, as is done by Hurd's Rev. Stat. (Ill.) 1913, chap. 114, §84, does not so directly burden interstate commerce as to render the statute invalid, irrespective of congressional legislation covering the subject, where the state courts hold that the question what is a reasonable time in any case depends upon all existing circumstances and conditions, including the requirements of interstate commerce. *Illinois C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed., 1306, 35 Sup. Ct. 760.

A state statute which requires a carrier to furnish cars to shippers within a reasonable time after demand is valid and constitutional and does not conflict with the Interstate Commerce Act. *Illinois C. R. Co. v. Mulberry Coal Co.*, 238 U. S., 275, 59 L. Ed., 1306, 35 Sup. Ct. 760.

A state court has jurisdiction, without preliminary action by the Interstate Commerce Commission, under the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, §8563),

§§8, 9, 22, giving shippers new rights, but preserving existing ones (which on this point are not affected by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, §8563), of a suit by a shipper against an interstate carrier to recover the damages caused by the latter's failure to discharge its duty under Hurd's Rev. Stat. (Ill.) 1913, chap. 114, §84, to furnish the cars needed by a shipper within a reasonable time after demand, although the cars demanded were to be used in interstate commerce, and although the action may involve the carrier's duty to deliver cars during a time of car shortage, and when the plaintiff and other shippers were making the greater portion of their shipments in interstate commerce, since the carrier's rule of car distribution not being attacked, there is no administrative question involved. *Illinois C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S., 275, 59 L. Ed., 1306, 35 Sup. Ct. 760, 761.

Under Revisal 1905, §2631, making it the duty of a transportation company to receive all articles of the kind received by such companies for transportation whenever tendered at a regular depot, station, etc., and imposing a penalty of \$50 for each day such company refuses to receive such shipment, imposes a penalty for each day upon which freight was at the depot ready for shipment; but the company is not liable for the penalty unless there was a tender, actual

were taken on <sup>42</sup> when it could be done without delay, the express company was under no obligation to receive and ship 30 crates of strawberries on train 42, which was not equipped for their transportation in such large quantities, but performed its duty to carry them by shipping them on the first train after their re-

or constructive, and refusal each day. *Bane v. Atlantic Coast Line R. Co.* (N. C. 1916) 88 S. E. 477.

The state under Rev. St. 1911, art. 6676, authorizing the Railroad Commission to order railroads engaged in interstate commerce to stop through trains at county seat stations, may require the stoppage of interstate trains at a county seat within its limits, where the carrier has not otherwise provided sufficient railway facilities for it. *Gulf C. & S. F. Ry. Co. v. State* (Tex. 1916) 181 S. W. 685.

mission has no power to require

The Interstate Commerce Commission a carrier to purchase a certain type of cars as for instance, tank cars in order to enable it to adequately handle the business tendered to it by a shipper. *Pennsylvania R. Co. v. United States*, 227 Fed. 911, 921.

In an action for failure to furnish cars for watermelons where it appears the melons were in fact, tendered to the carrier, the proof should be clear and definite that damages as alleged were, in fact, sustained in the actual loss of marketable melons in the field, and that such loss was proximately caused by the carrier's unexcused breach of its contract or duty to furnish cars as alleged. *Seaboard Air Line Ry. v. Roberts*, (Fla. 1916) 70 So. 773.

Rev. St. 1909, §3108, provides that every railroad upon the writ-

ten application of any shipper must furnish cars, and that for failure to do so the company shall pay the shipper \$1 a day for each car. Section 3116 declares that section 3108 is a supplemental law, not intended to repeal, modify, or affect any law concerning the shipment of freight, or any other law concerning common carriers, unless in direct conflict therewith. Shippers made verbal demand for cars upon defendant railroad, which were not furnished, and sued. HELD that they could recover for breach of the road's common-law duty to furnish cars, since section 3116 kept alive their common-law right of action in the absence of direct conflict in section 3108 with the common law, which was not the case, as such section merely prescribes, in addition to the common-law measure of damages, a penalty for failure to furnish cars when the application therefor has been in writing. *Raper v. Lusk* (Mo. 1916) 181 S. W. 1032.

Where the carrier delivered a beer car, instead of a regular refrigerator car, for shipment of apples, the shipper's direction, after transportation by the carrier to the connecting carrier, to transport the apples to their destination, does not absolve the carrier from liability for injuries to the apples, caused by the improper car, as the shipper did not recover the damage until

ceipt that was properly equipped to carry them.<sup>12</sup> Where, after a carrier had breached its verbal contract to furnish cars for the transportation of cattle, the shipper without any additional consideration signed a bill of lading the terms of which he did not read or understand, waiving any claims for failure to provide cars in time, the stipulation was not binding on the shipper.<sup>13</sup> So, it has been held, three days' notice of a demand for cars for a shipment of live stock, in a period of great activity in such shipment, is not reasonable nor sufficient.<sup>14</sup> But, the obligation of a carrier to furnish cars to a patron may arise either from the duty imposed by law, or from a special contract between the carrier and the patron. In a suit for a breach of special contract, matters which will not excuse performance of the contract, but only tend to excuse performance of the general duty imposed by law, are not relevant. Where the obligation springs from the contract, the carrier will be held liable in all cases where the circumstances are not such as to relieve from the performance

the car reached its destination. *Smith v. Wabash R. Co.* (Mo. 1916) 182 S. W. 764.

12. *Shaw v. Southern Express Co.*, (N. C. 1916), 88 S. E. 222.

13. *Pecos & N. T. Ry. Co. v. Stinson*, (Tex. 1916), 181 S. W. 526.

14. *McNeer, Talbot & Johnson v. Chesapeake & O. Ry. Co.* (W. Va. 1915) 86 S. E., 887, 888.

That a carrier of live stock furnished free transportation to the shipper as a caretaker is not consideration rendering binding a contract contained in a subsequently signed bill of lading waiving damages for failure to furnish cars as orally agreed. *Pecos & N. T. Ry. Co. v. Stinson* (Tex. 1916) 181 S. W. 526.

Moore on Carriers, 2d Edition, p. 142, says the following:

"In an action for the failure of a

carrier to furnish cars, the fact that, after the damages sued for had accrued, the shipper and the carrier entered into a contract for the shipment of the freight, did not affect the shipper's right to recover the damages sustained. Where there is no sufficient notice to furnish cars for the transportation of perishable freight, the carrier is not liable for loss sustained by deterioration of the goods due to the delay in transportation. In an action against a carrier for breach of its common law duty to furnish cars to transport freight without unreasonable delay, a standing order of the shipper for five cars a day was too indefinite to be the basis of an action for damages for failure to furnish them."

A carrier is liable for the consequences of its breach of contract to



of contracts generally.<sup>15</sup> Where a defective car is furnished by an initial carrier for the transportation of animals to a point beyond its own line and injuries are sustained by the animals by reason of such car being out of repair, the initial carrier is liable for such damages in the absence of any proof of negligence by the connecting carrier.<sup>16</sup> An application to a station agent for cars for a shipper's use on a particular day, made in the ordinary way, by one who has not been accustomed to take special contracts to furnish cars for particular dates, and without notice of intention or purpose to bind the company absolutely to furnish the cars on the day named, and the promise of the agent, in response to such application, to get the cars, do not prove a contract on the part of the railroad company, binding it absolutely to furnish them on the day named. So, the making of a special contract of shipment, as one to expedite delivery or furnish cars to a shipper on a particular day, is within the scope of the apparent authority of a station agent, and the shipper, in the absence of knowledge of a limitation or restriction upon such authority, may make a valid and binding contract with the company, through him, for the delivery of cars at his station, on a particular day, for the shipper's use.<sup>17</sup> Irrespective of contract, the carrier must furnish cars with the promptness the occasion demands. In a typical case, the

furnish cars within a shorter time than required by statute, though the result of inability was due to an unusual demand for cars. *Texas & N. O. R. Co. v. Weems* (Tex. 1916) 184 S. W. 1103.

Under Revisal 1905, §2632, providing that delay of two days at the initial point shall not be charged against the carrier as unreasonable, and shall be held to be prima facie reasonable, where a shipper of strawberries tendered 30 crates of berries to a certain express company only seven or eight minutes before the arrival of a train,

just as it was seen approaching the station, the express company was not liable as for an unreasonable delay for its failure to ship on such train. *Shaw v. Southern Express Co.* (N. C. 1916) 88 S. E. 222.

15. *Georgia Northern Ry. Co. v.* 85 S. E. 790, 791; *McNeer, Talbot & Johnson v. Chesapeake & O. Ry. Co.*, (W. Va. 1915), 86 S. E. 887.

16. *Fuller v. Chicago & N. W. Ry. Co.*, (Neb. 1916), 157 N. W. 332.

17. *McNeer, Talbot & Johnson v. Chesapeake & O. Ry. Co.*, (W. Va. 1915), 86 S. E. 887.

shippers sued to recover damages suffered by reason of failure to furnish cars to load cattle at 5:00 a. m. on July 23, 1913, thus causing the cattle to be kept in the pens until 4:10 p. m. on July 23, and in failing to furnish facilities for watering them, and because of such delay in transporting the cattle and rough handling thereof, which acts were stated to constitute negligence, and to have caused the cattle to arrive upon the market at Fort Worth one day later than they would have arrived had no delays occurred, and also caused the death and injury of some of the cattle. The trial resulted in a verdict and judgment in favor of the shippers, which was upheld on appeal.<sup>18</sup> So where a railroad agrees to furnish an iced car for the transportation of perishable produce by a day fixed, it is held strictly to the performance of such contract.<sup>19</sup> So where a grower of peaches applies to the railroad for a car to be properly iced and ready to receive his shipment on the 20th of the month, giving such notice two or three days prior thereto, the railroad is responsible for the injuries caused such grower by failure to properly and promptly keep such agreement.<sup>20</sup>

Although a common carrier is bound to provide reasonable facilities of transportation to all shippers at every station who in the regular and expected course of business offer their goods for transportation, it is not required to prepare in advance for an unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping or even in receiving goods for shipment until such emergency can in the usual and regular course of business be removed.<sup>21</sup> Very frequently shipping contracts contain a provision that the shipper has inspected the car and finds it suitable. An agreement requiring the shipper to inspect the cars, and accept them if in good condition, and declaring that, in the event of failure, it shall be conclusively presumed

18. *San Antonio U. S. & G. Ry. Co. v. Storey*, (Tex. 1915) 172 S. W. 188. *v. Tilby*, (Ark. 1915), 174 S. W., 1167.

19. *St. Louis, I. M. & S. Ry. Co. v. Tilby* (Ark. 1915) 174 S. W., 1167, 1169.

20. *St. Louis, I. M. & S. Ry. Co.*

21. *St. L. S. W. Ry. Co. v. Clay County Gin Co.*, 77 Ark. 362, 92 S. W. 531. *St. Louis I. M. & S. R. Co. v. Laser Grain Co.*, (Ark. 1915)

179 S. W. 189, 191, 192.

that the cars were suitable, is void.<sup>22</sup> Though a shipper examined and deemed a car sufficient for the transportation of horses, the railroad company is not relieved from liability for defects in the car.<sup>23</sup> This is so because it is the duty of a common carrier to furnish suitable and proper cars to be used in shipping stock.<sup>24</sup>

It must be remembered, however, that the carrier has only to place cars at such places as either by custom or contract it obligates itself to do. Railroads are only required by law to furnish cars for the shipment of freight at stations or points on their road provided for the service of the public, or where the railroads are in the habit of accepting freight from any person offering same for transportation. So where a spur was a private track built for the sole and special use of a lumber company, and was under the exclusive control of that company, the railroad company could not, without violating its contract with the lumber company, which had assisted in the construction of the spur, place cars thereon for the use of shippers generally, unless by permission of said company.<sup>25</sup> With reference to live stock there can be no doubt that the law casts an obligation on a common carrier of live stock to exercise ordinary care to maintain its pens for the reception of stock in a reasonably safe condition so as to prevent the injury or escape of the animals placed therein by a patron for shipment.<sup>26</sup> Neither does a carrier, which maintains pens for the custody of live stock, prior

22. *Southern Kansas Ry. Co. of Texas v. Hughey*, (Tex. 1916), 182 S. W. 361.

23. *Washington Horse Exchange v. Louisville & N. R. Co.*, (N. C. 1916), 87 S. E. 941.

24. *Fuller v. Chicago & N. W. Ry. Co.*, (Nebr. 1916), 157 N. W. 332, 333; *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Nebr. 307, 63 N. W. 790; *Union P. R. Co. v. Langan*, 52 Neb. 105, 71 N. W. 979; *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726, 118 N. W. 655, 23 L. R. A. (N. S.), 278.

25. *Beaumont, S. L. & W. Ry. Co. v. Moore* (Texas 1915) 174 S. W., 844, 847.

26. *Humphreys v. St. Louis & H. Ry. Co.* (Missouri 1915) 178 S. W. 233, 234. *Reading v. Chicago, B. & Q. R. Co.*, 165 Mo. App. 123, 145 S. W. 1166; *Lackland v. Chicago & A. R. Co.*, 101 Mo. App. 420, 74 S. W. 505; *Mason v. Mo. Pac. R. Co.*, 25 Mo. App. 473; *Holland v. Chicago, R. I. & P. R. Co.*, 163, Mo. App. 251, 146 S. W. 1181; 1 *Hutchinson on Carriers* (3rd Ed., M. & D.) 114, 115.

to shipments, have to receive express notice that live stock has been put in pens, in order to charge it with negligence with keeping defective pens, and the railroad is responsible if through a broken fence in the pen, the live stock escapes.<sup>27</sup>

**5. Transportation Over Designated Route.** A carrier is liable for moving a perishable shipment by a different route than one selected by the shipper, and contrary to his instructions, where at the time shipment was accepted, shipper gave direction in writing as to route by which shipment should move, the route being written on the carrier's receipt; and the fact that the conductor who issued the receipt erased this part of the writing, after the carrier had obtained complete possession of the shipment and the movement of the same had commenced, would not relieve the carrier from the obligation to conform thereto.<sup>28</sup> Where it appears that the proximate cause of damage to a shipment of fruit was delay in transit due to the diversion by the carrier of the shipment from the route originally designated by the shipper, and that at the point of destination there was no market for fruit, but the sole purpose of transportation to that point was the distribution and forwarding of the fruit to such market as might at the time of the arrival of the fruit afford the best opportunity for its advantageous disposal and be the most available and nearest actual market, and it further appears that there was unreasonable delay on the part of the shipper in forwarding the shipment (which had been delayed by the act of the carrier in reaching its original destination) from the point designated by the contract of affreightment to the most available market, the measure of damages would be the difference between the market price at such most available market and the price actually received for the shipment in its damaged condition. This is especially true where there was no evidence tending to show that the fruit, with proper icing, would not have arrived at the point of most available sale in marketable condition, but for the delay caused by the carrier in diverting the shipment by a route which

27. *Humphreys v. St. Louis & H. Ry. Co.* (Missouri 1915) 178 S. W. 233, 234.      28. *Lamb v. Moor*, (Ga. 1916), 87 S. E. 837, 838.

required a longer time and on which the icing was insufficient. It was the duty of the shipper, under such circumstances, to diminish the resulting damages as far as possible.<sup>29</sup>

29. *Lamb v. Moor*, (Ga. 1916),  
87 S. E. 837, 838.

### **III**

#### **NEGLIGENCE DURING TRANSPORTATION**

##### **A. Circumstances Relieving From Liability.**

- Inherent Nature of Shipment.**
- Act of God.**
- Loss Through Act of the Public Enemy.**
- Operation of Law.**
- Fault of Shipper.**

##### **B. Acts Showing Negligence.**

- 1. Defective Appliances.**
- 2. Delay.**
- 3. Fire.**
- 4. Flood.**
- 5. Freezing.**
- 6. Refrigeration.**
- 7. Rough Handling.**

**A. Circumstances Relieving From Liability. In General.** By far the greater number of claims arise because of the negligence of the carrier during transportation. Since it is held to an extraordinary degree of care in practically all instances, it is obvious that what might legally be termed negligence might not appear as such to the lay mind. The carrier performs transportation for hire. Being paid for this service, the law early read into the contract of transportation the extraordinary liability of insurer. It was assumed the rate charged was high enough to fully compensate the carrier for such damages as it might be compelled to pay because of oversight or carelessness on the part of anyone of its numerous employees. It was deemed to the public interest to hold the carrier to such strict accountability. If not, and the carrier could plead exemption because the carelessness of an employe was unintentional, then there would be no inducement to a carrier to be careful in its operation or circumspect in its hir-

ing of employes. Recognizing however, that no matter how careful the carrier might be, there were certain causes of loss over which it had no control, the law exempted the carrier from loss caused thru anyone of five reasons. These are an act of God, such as an earthquake, avalanche and the like; an act of the public enemy, which means hostile troops, but not strikers; the fault of the shipper, such as defective loading of the goods, where the shipper loads; and the natural propensities of live stock, in case of such shipments, which exempts from injuries caused thru goring, fighting and the like; the last exemption might be termed exemption thru special laws, and refers only to exemptions in the navigation laws, under which, in certain cases, a vessel can throw its cargo overboard without incurring any liability therefor. These are general rules, however, and exceedingly dangerous when applied by inexperienced or biased parties. Like all general rules, they have been very greatly modified by the decisions of the various courts. An exhaustive discussion is out of place here, but some slight explanation will be attempted. In analyzing cases in which the carrier claims an exemption it is desirable that the theory concerning the liability of the carrier be always kept in mind. Many courts have gone astray on this question. It is surprising how many courts, in holding the carrier liable for loss, assume that it is merely a case of negligence, that is, that the carrier is liable for loss because it is negligent. Around that fallacious theory has grown up those cases which are so vexatious to the traffic counsel, and mislead so many claim agents. A claim is presented against a carrier; the claim agent investigates and finds that the railroad acted with due diligence in transporting and can find no record of rough handling. Nevertheless, damage has occurred. He refers the case to the railroad's commerce counsel. The law is examined and those cases are found which appear to place the liability of the carrier on the ground of negligence. No negligence appearing in this case, the claim is declined. Now the carrier may innocently have done an injustice to the shipper and turned down a claim which was perfectly valid. The carrier is held liable for loss because it is paid a consideration to safely transport the shipment from origin to destination. The failure

of the carrier to safely transport the goods is therefore the breach of a contract. Since, under our system of jurisprudence, claim for such loss or damage may be brought either as damages for breach of the contract or in what is called a tort action, that is, an action for a wrong done to the owner of the goods, it is presumed that since the goods were not safely carried the carrier committed the wrong by being negligent. It is seen therefore that the negligence of the carrier is not because the goods were damaged but the wrong is because the goods were not safely transported, which is conclusively shown by the goods being damaged or lost. This wrong is not excused by the carrier showing it used care in the transportation, because it was early declared in the law that public policy demanded that the carrier be held to a strict performance of its contract for safe transportation. It is on this account that it was very early held that the carrier could not by contract exempt itself from liability for loss or damage caused by its negligence. Recognizing, however, the right of persons dealing on an equality to enter into such contract as they desired, it has come to be the rule that for a consideration the shipper and the carrier can agree that the liability for loss or damage, no matter how caused, may be limited to a certain amount. This phase of the law will be discussed more in detail under the Cummins Amendment, Chapter 8. It was also early recognized that there were certain causes which occasioned loss and over which the carrier had no control. It was considered unfair to hold it to liability in these cases and it is a brief discussion of these five excepted causes which we now come to.

**Inherent Nature of Shipment as Relieving From Liability.** This doctrine generally applies to shipments of perishable produce and live stock, although it may be invoked in any case where the inherent character of the goods shipped, is such as to naturally cause a deterioration during transit. For instance, if perishable produce is shipped in poor condition, so that in spite of all necessary precautions and the usual scheduled transportation, the produce has decayed by the time it reaches destination, the carrier is not liable in a case of this kind. Very often grapes, for instance, have been damaged by a rainy season. They are packed carefully, shipped under pro-



per refrigeration, but decay is due to natural causes and not to any breach of contract of the carrier. Under these conditions the carrier cannot be held responsible. On the other hand, it must be borne in mind that if negligence of the carrier also is shown, the carrier is, by the weight of authority, held responsible. So damages sustained through livestock being unruly, vicious, and ill tempered, are not such damages as the carrier is responsible for. On the other hand, if the carrier confines the stock in pens too small, or transports it under such conditions that its negligence contributes to the injury, then as in the case of shipments of perishable produce, it may be held responsible.

**Act of God.** An Act of God is such an inevitable, or unavoidable accident not attributable to human agency as produces injury to the goods. It must be one of those misfortunes which no skill or watchfulness on the part of the carrier could have foreseen. Many examples will at once suggest themselves to the reader. Floods, cyclones, earthquakes, and the like are generally regarded as furnishing an excepted cause. But even these will not excuse the carrier if they could have been foreseen by the carrier or if it had knowledge in time to protect the shipments. This will be discussed somewhat more in detail under other sections.<sup>1</sup>

**Loss Through Act of the Public Enemy.** While a loss suffered because of such an agency excuses the carrier, an excuse of this kind very rarely arises. What is meant by public enemy is an enemy of the country to which the carrier belongs. Thieves, robbers, rioters, strikers, and unruly soldiers are not deemed public enemies, and damages caused through the act of any such persons is not under this class.

**Operation of Law.** This exception to liability is only a very rare one. It can only arise in cases where a loss occurs on a connecting water carrier. Under the Harter Act, vessels are discharged from liability in certain cases where necessary to throw a cargo overboard. Since under the Carmack Amendment the initial carrier is liable for any loss occasioned through the default of a connecting carrier, it has recently been held that where under the Harter Act the water carrier is exempt-

1. See Chapter VI, *Infra*.

ed from liability, this inures to the benefit of the initial rail carrier.

**Fault of Shipper as Relieving From Liability.** It is the practice for shippers of carloads to load the freight. The carrier therefore has no supervision over packing and bracing of the shipment. Frequently the cars are delivered to the railroad already sealed. If the carrier has furnished a suitable car for the shipment it is the duty of the shipper to properly pack his shipments in loading the car. Any damage, therefore, which is occasioned through the defective loading or packing of the car is the fault of the shipper and the carrier is not liable for such damage. But, on the other hand the carrier is liable in spite of defective loading if it furnished an improper car or handles the shipment roughly in transit or is guilty of any other act which contributes to the injury.

#### B. ACTS SHOWING NEGLIGENCE.

1. **Defective Appliances.** Very frequently damages during transportation arise from the fact that the car in which the goods are shipped is defective. Sometimes protruding nuts, bolts, nails, and similar things cause damage. Leaky roofs permitting rain to come in is another common defect. Claims for such damages are generally declined because of the fact that the shipper has examined and accepted the car. A common carrier is bound to furnish shippers suitable, safe and secure cars in which to carry such property as it holds itself out as transporting, and is liable for any damage resulting from its failure to do so. Injury to property because of bolts, nails, leaky roofs and the like, are occasioned not from any failure of the shipper to properly pack his shipment, but because of the defective instrumentality of transportation furnished. The carrier's duty to furnish properly equipped cars is not fulfilled by the mere purchase of a quantity of box cars to be used promiscuously for all kinds of freight. It must furnish such instrumentalities as will safely carry the commodities that it accepts for transportation; thus if it holds itself out as a carrier of perishable produce, it must furnish refrigerator cars when these are necessary. If it is a carrier of live stock, it must furnish the regular live stock cars and equipment. It could not fulfill its duty by tendering a car for the transportation of food produce in which live stock had been carried. If it agrees to transport oriental rugs

its duty is not fulfilled by loading them into open cars. Supposing it had cars in service on which false bottoms had been nailed for the carriage of a certain commodity. The false bottoms and sides had been torn out and the nails and bolts left protruding, could it be argued that the carrier had fulfilled its duty in furnishing such equipment for shipments of paper? Obviously not, because it would not be a safe and secure car for the transportation of that commodity. A shipper is not bound to take a searchlight and examine every nook and cranny of the car to see that it is suitable. If it notifies the carrier to furnish a car when such car is tendered, it has the right to assume that it is proper for the purpose for which it is to be used. While the state courts seem somewhat divided upon the question as to the effect of a provision in the bill of lading that the shipper has examined a car and finds it to be safe and suitable, the better rule seems to be that such a provision is invalid as operating to cast upon the shipper the duty of inspecting and determining the safety and efficiency of the means the carrier has provided for the discharge of its public duty. Its necessary effect would be to release the carrier from liability for negligence for failure to provide safe and suitable vehicles. This reasoning seems to be upheld by the great weight of authority and is certainly in line with the provisions in the Cummins Amendment. The Supreme Court of the United States has been inclined to the view that the fact that the shipper uses a defective car, knowing it to be defective, does not relieve the railroad from liability in the absence of a distinct agreement to that effect.<sup>2</sup>

2. Railroad Company v. Pratt (22 Wall) 89 U. S., 123.

A common carrier is bound to furnish shippers, suitable, safe, and secure cars in which to carry such property as it holds itself at as transporting and is liable for any damage resulting from its failure to do so.

In *St. L. I. M. & S. Ry. Co. v. Marshall*, 74 Ark., 597 a defective car was furnished for the shipment of potatoes which were dam-

aged through rain leaking through the car. The shipper knew the condition of the car and accepted it for shipment. In permitting recovery for the damage to the potatoes caused by rain, the court said: p. 599:

"The carrier must furnish suitable and proper cars for the purposes of the shipment. 4 Elliott on Railroads sec. 1475. If the carrier fails to furnish proper cars, and damage results

2. **Delay in Transit.** Of all classes of claims perhaps the most numerous are those for damages due to delay. Particularly is this true of livestock and perishable produce claims. This class of claims is very vexatious because so many elements enter into it which must be considered. Then again,

from the defect in the car, then the carrier who furnished the defective car is liable, although the actual injury may have occurred beyond its line. Indianapolis, etc. Ry. v. Strain, 81 Ill. 504; Ala. & Vicksburg Ry. v. Searles, 71 Miss. 744; Searles v. Ala. & Vicksburg Ry. 69 Miss. 186; 4 Elliott, Railroads, Sec. 1448 and notes."

To the same effect see the following cases.

- Froelich v. Pennsylvania Co. 138 Mich. 116.  
 Railroad v. Dies, 91 Tenn. 177.  
 C. & A. R. R. Co. v. Davis 159 Ill., 53.  
 I. B. & W. Ry. v. Strain 81 Ill., 504.  
 Railway Co. v. Searles 71 Miss., 744.  
 Searles v. A. W. Ry. Co. 69 Miss., 186.  
 St. L. I. M. & S. Ry. v. Lesser 46 Ark., 236.  
 Welsh v. P. F. W. & C. R. R. 10 Ohio State 65.  
 Railroad Company v. Pratt 89 U. S. 123 (22 Wall.)  
 Elliott on R. R. 2nd edition, sec 1475, 1478.  
 Hoosier Stone Co. v. Louisville etc., 131 Ind. 575.  
 Coupland v. Housatonic R. R. Co. 61 Conn. 531.  
 New Jersey etc., Co. v. Merchants' Bank, 6 How. (U. S.) 344.  
 Levering v. Union etc. Co. 63 Pa. St. 14.  
 Paramore v. Western R. R. Co. 53 Ga. 383.  
 Insurance Co. v. St. L. R. R. Co. 3 McCrary (U. S.) 233.  
 Bissell v. New York C. R. R. Co. 25 N. Y. 442.  
 Ford v. London etc. R. Co. 2 Fost. & Fin. N. P. 730.  
 Merchants' D. Co. v. Cornforth, 3 Colo. 280.  
 Boscowitz v. Adams Expr. Co. 93 Ill. 523.  
 Lyon v. Mells 5 East 428.  
 Combe v. London etc. R. Co. 31 L. T. R. (N. S.) 612.  
 Ayres v. Chicago & N. W. R. Co. 71 Wis. 372.  
 Wallingford v. Columbia etc. R. Co. 26 S. Car. 258.  
 Hamilton v. Western etc. R. Co. 96 N. C. 398.  
 Leonard v. Fitchburg R. Co. 143 Mass. 307.  
 Hart v. Allen, 2 Watts (Pa.) 114.  
 New Jersey etc. R. Co. v. Kennard, 21 Pa. St. 203.  
 Smith v. New Haven etc. R. Co. 12 Allen (Mass.) 531.  
 Pratt v. Odgensburg etc. R. Co. 102 Mass. 557.  
 Chicago & A. R. R. Co. v. Sufferin, 129 Ill. 274.  
 Costello v. Syracuse etc. R. Co. 65 Barb. (N. Y.) 92.  
 Illinois Central R. R. Co. v. Baches, 55 Ill. 379.

there are many shippers who resort to devices which cause the railroad a great deal of trouble. It is well known that the "shrink" of cattle, for instance, is a very dubious and unknown quantity, particularly if the shipper has filled the cattle to bursting with water just before shipment. On the other hand, crowding too many cattle into a car is not doing them any good, hence a delay, which under ordinary circumstances might not amount to anything, in such a case can cause very severe loss to the live stock shipper. Hence the rule has grown up that carriers of live stock and perishable produce are held to a stricter schedule of transportation than in the case of other freight. The fact that shippers rely on reaching a cer-

Rice v. Western etc. R. Co. 3  
Inters. Rep. Com. 162.  
Scotfield v. Lake Shore etc. R.  
Co. 2 Inters. Com. 67.  
St. Louis, I. M. & S. Ry. Co. v.  
Marshall, 74 Ark. 597.  
Harris v. Railroad Company 20  
N. Y. 232.  
Railway Company v. Dorman 72  
Illinois 504.  
Potts v. Railway 17 Mo. Appl.  
394.  
Propeller & Niagara v. Cordes  
21 How. 23.  
The Northern Belle, 9 Wall 526.  
The C. & A. Ry. Co. v. Burke,  
13 Wend. 611.  
Lyon v. Mells 5 East 428.  
Smith v. New Haven Ry. Co.  
12 Allen, 531.  
Mason v. the M. P. Railroad 25  
Mo. App. 473.  
Slown v. the Railroad 58 Mo.  
220.

It seems clear that by the weight of authority the carrier is responsible for such damages, irrespective of whether the shipper accepted and loaded the car or not.

The rule is even stricter as ap-

plied to perishable goods. Thus Michie on Carriers, P. 784, states the rule as follows:

"A carrier undertaking to transport perishable goods is bound to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract. If it undertakes to carry perishable property in vehicles specially adapted to preserve that kind of property, it becomes responsible for defects in such vehicles, if damage results. The carrier is not relieved of responsibility to the consignee therefor by the fact that it had the car inspected by the shipper from whom the goods were brought." Also see:

St. Louis, etc., R. Co. v. Renfro, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 317.  
Missouri, etc., R. Co. v. McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.  
Western Railway v. Hart, 160 Ala., 599, 49 So. 371.

tain market by a definite time is also of considerable weight. The Supreme Court of the United States recently upheld a verdict for damages due to missing the market for strawberries by a few hours.<sup>3</sup> Where a shipment of dressed poultry could have been brought to its destination in time for the market of a given day by diverting it to another train at an intermediate point, and as a result of failure to so divert the shipment the poultry was spoiled, and was not in fit condition when the market was opened on the following day, the carrier was liable.<sup>4</sup>

However, mere delay in the shipment of live stock, not unreasonable of itself, is not sufficient to afford an inference of negligence,<sup>5</sup> although an unexplained delay of eight hours in the movement of a live stock shipment to be transported 90 miles is unreasonable and makes out a *prima facie* case of negligence against the carrier.<sup>6</sup> No negligence can be imputed to a carrier because of a delay over night at a division point in making connection with a train on the carrier's branch line.<sup>7</sup> Carriers of live stock are not responsible for the usual and ordinary delays incident to the ordinary conduct of their business,<sup>8</sup> but

3. *N. Y. P. & H. R. R. Co. v. Peninsular Prod. Ex.*, 240 U. S. 34, 60 L. Ed.—, 36 Sup. Ct. 230.

Damages for the loss of the market because of unreasonable delay in transportation occurring anywhere en route are comprehended by the provision of the Carmack amendment. *New York, P. & N. R. Co. v. Peninsula Produce Exch.*, *Supra*.

*Patterson v. Chicago & A. Ry. Co.*, (Mo. 1916), 182 S. W. 1034.

4. *Whittom v. Adams Express Co.*, (Mo. 1916), 182 S. W. 137.

5. *Dalton v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 77, 78.

6. *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 61, 63.

A jury may infer without further

proof that eight days is an unreasonable time for the transportation of goods by rail a distance of less than 100 miles. *Engemann v. Delaware L. & W. R. Co.* (N. J. 1916) 97 Atl. 152.

A common carrier of goods, though an insurer of their safe delivery, unless prevented by the act of God or the public enemy, does not insure against delay in delivery, but is merely bound to carry out its contract, and liable for an unreasonable delay. *Piero v. Southern Express Co.* (S. C. 1916) 88 S. E. 269.

7. *Patterson v. Chicago & A. Ry. Co.*, (Mo. 1916), 182 S. W. 1034.

8. *International & G. N. Ry. Co. v. Landa & Storey*, (Tex. 1916), 183 S. W. 384.

where the usual and reasonable time for transportation of a shipment is 2 or 3 days, a delay of 40 days makes out a prima facie case of negligence and casts upon the delivering carrier the burden of showing that the damage from the delay was not occasioned by it.<sup>9</sup> And while mere delay, without more, might be insufficient to support a recovery, it is "enough for the claimant to disclose circumstances sufficient to raise a fair inference of negligence," since the means of showing the cause of the delay is with the carrier and not the shipper.<sup>10</sup> It is held that slight evidence of negligence is sufficient to support a finding that delay in transportation is unreasonable.<sup>11</sup> Unreasonable delays at points en route, wholly unexplained, are sufficient to raise an inference of negligence.<sup>12</sup> It has been said that in order to cast liability upon the carrier for any loss suffered by reason of delay in making the shipment, it must be shown, either directly or inferentially, that the delay was one resulting from the negligence of defendant or its agents and servants. A mere showing of delay is insufficient, for it affords no inference that it was caused by the negligence of the carrier.<sup>13</sup> This doctrine however, may well be said to be against the weight of authority. The movements of the train are under the exclusive management and control of the carrier, and the facts which cause the train to be delayed are peculiarly within the knowledge of the officers and agents of the railway company. As was pertinently remarked by the Supreme Court of Washington, in *Jolliffe v. Northern Pacific Ry. Co.*, 52 Wash.

9. *Central of Georgia Ry. Co. v. Goodwater Mfg. Co.*, 69 So. 343.

10. *Gregory v. Railroad*, 174 Mo. App. 550, 160 S. W. 830.

11. *McFall v. Railroad*, 181 Mo. App. 149, 168, S. W. 341; *Mulr v. Railroad*, 168 Mo. App. 542, 154 S. W. 877; *Lay v. Railroad*, 157 Mo. App. 467, 138 S. W. 884; *Wright v. Railroad*, 118 Mo. App. 482, 94 S. W. 992.

12. *Libby v. Railroad*, 137 Mo. App. Loc. Cit. 282, 117 S. W. 659;

*McFall v. Railroad*, supra, 181 Mo. App. Loc. Cit. 149, 168 S. W. 341. *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 61, 62, 63.

13. *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 61, 62.

To recover damages for delaying a shipment of live stock, the shipper must show prima facie that the delay was caused by negligence of the carrier; mere proof of delay being insufficient therefor. *Sikes v. St. Louis & S. F. R. Co.*, (Mo. 1915) 176 S. W., 255.

433, 100 Pac. 977: "A car may be sidetracked and delayed for one hour, or for twenty-four hours, by order of the train dispatcher, or somebody in authority hundreds of miles away, for necessity which is apparent to him; and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is side-tracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to him. This court and other courts have frequently said that, where it is necessary to make a character of proof, which by reason of the circumstances surrounding the case is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof."<sup>14</sup> To impose upon the shipper the burden of ascertaining the cause of every delay in the transportation of his property and refuse relief in the absence of such proof would be tantamount to denying any right of action for damages resulting from negligent delays in transportation. When the claimant shows the carrier consumes a substantially longer period in delivering his shipment over a route which usually consumes a much shorter time, he meets the burden imposed upon him to make out a prima facie case, and calls upon the carrier for explanation, as the party possessing knowledge of the facts which occasioned the delays. In *Nelson v. Chicago B. & Q. Ry. Co.*, 78 Neb. 57, 110 N. W. 741, the court said: "While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of live stock or other freight, yet, where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence." In *Bosley v. Baltimore & O. R. Co.*, 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871, the court quoted with approval from 5 Am. & Eng. Enc. Law (2d Ed.) 254, as follows:

14. See, also, note to *Cleve. v. Cas.* 33.  
*Chicago, B. & Q. Ry. Co.*, 15 Ann.



"It seems, however, that on proof of a delay in delivery a prima facie case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by the shipper." In *Johnson v. New York, N. H. & H. R. R.*, 111 Me. 263, 88 Atl. 988, the court said: "If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries; the time occupied being fifty-three hours instead of twenty-four hours or less, the ordinary time. It is so far sufficient that it puts the onus of explanation on the defendant." In 4 *Elliott on Railroads* (2d Ed.) No. 1583, the rule is stated as follows: "The fact that there was unusual delay does not always show a breach of duty. The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable; but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury, under proper instructions. Where the delay is an unusual one, and is not explained, it is held to be prima facie evidence of negligence, but that, in a case where there is only a slight delay, the rule is different."<sup>15</sup> It must be conceded that the authorities are by no means unanimous in supporting the rule as we have announced it, as a reference to 4 *Rul. Case Law*, No. 464, and other texts will demonstrate; but the rule referred to seems supported by the weight of authority. It is certainly the one which is most reasonable and imposes the least hardship.<sup>16</sup> An unexplained delay of four days in transporting potatoes 56 miles raised a presumption of negligence.<sup>17</sup> The same, where a stock train is delayed 11 hours in a 225 mile run.<sup>18</sup>

15. *Tiller & Smith v. Chicago B. & Q. Ry. Co.*, (Iowa) 112 N. W. 631.

16. *Wall v. N. P. Ry. Co.* (Mont. 1914), 145 Pac., 291, 293, 294.

17. *Watson v. Union Pac. R. Co.*, (Mo. 1915), 178 S. W. 871, 872.

18. *Karr v. Baltimore & O. R. Co.*, (W. Va. 1915), 86 S. E. 43, 45.

What is a reasonable time for transportation is a question for the jury, depending upon the facts and circumstances of each particular case, and upon the nature of the freight to be carried. Proof of failure to deliver at the place of destination within the usual schedule time establishes a prima facie case of negligence, and makes it incumbent upon the railroad company to justify the delay. Live stock requires more rapid transportation than coal or lumber, for instance, and it is the duty, as well as the custom of railroad companies to furnish more rapid transportation for the former than the latter.<sup>19</sup> Since each case of delay must to a certain extent depend upon its own facts it may not be out of place to consider recent specific cases. The Rock Island lines had operated a stock train on Sundays, Tuesdays and Thursdays of each week from Keota, Ia., to Chicago, Ill., for about 10 years. The agent at Keota agreed with the plaintiff to furnish a car for this train on one of these days, but that day the train did not run, whereby delay resulted

19. *Karr v. Baltimore & O. R. Co.*, (W. V. 1915), 86 S. E. 43, 45.

Act June 29, 1906, c. 3594, §1, 34 Stat. 607 (Comp. St. 1913, §8651), prohibits interstate carriers from confining live stock in cars, etc., for longer than 28 consecutive hours without unloading them for rest, water, and feeding, unless prevented by storm or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight. When four car loads of sheep were delivered to a carrier, there remained over 16 hours in which to make delivery, and that time would ordinarily have been sufficient. When the shipment left G., 100 miles from its destination, at which place there were facilities for unloading one car load, there remained 5 hours and 30 minutes, and there was no unloading place

between that point and the destination. It was then reasonably expected that the train would make the run within that time. A hot box developed on the engine tender, and another engine was procured, which developed leaks, and the failure of the two engines to work made delivery impossible within the time limit. The first engine had recently been overhauled, and there was no special reason for anticipating a hot box, and the second engine had worked well on its last previous trip; the defect which caused the delay first developing on the run in question. Held, that the delay was caused by accidental or unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight. *United States v. Boston & M. R. R.* 228 Fed. 915.

in the hauling of plaintiff's livestock, resulting in shrinkage. Held, the train was not an extra train, but one regularly operated and the contract that the livestock should be transported on a certain day was not an engagement for a special service, prohibited by the Interstate Commerce Act.<sup>20</sup> A shipper of live stock entered into a special contract with the carrier and, in consideration of a reduced freight rate, agreed that he had examined and found in good order and condition the car provided for the transportation of his live stock; that he accepted the same, and agreed that as thus provided it was suitable and sufficient for said purposes; that in case of delays of trains from any cause he was to feed, water, and take proper care of the stock at his own expense; and that the carrier was not bound to carry the stock by any particular train or in time for any particular market, or otherwise than with as reasonable dispatch as its general business would permit. It was further agreed that, as a condition precedent to the shipper's right to recover any damages for loss or injury to the stock, the owner or person in charge of the stock should give notice in writing of his claim to the agent before the stock was removed from the place of delivery of the same, and before such stock was mingled with other stock. Upon the trial of an action brought by the shipper against the carrier, for damages in the value of one of the animals, alleged to have died, and on account of injuries to others, because they were without food, exercise, or water during the period of transportation, it appeared from the evidence that the plaintiff, before signing the contract, examined the car; that he failed to accompany the stock or make provision for their being fed, watered and cared for; that the stock were loaded at noon, left about three hours after being put upon the car, and arrived at a junction point at 7:30 p. m., where they remained in the car until the next afternoon, when they were transported, by the first scheduled train to their destination, reaching there at 5:30 p. m.; that the stock were transported on the first trains of the carrier scheduled between the initial point and their destination; that the trains were run on schedule time; and that as no written claim, as provided in the contract, was presented to the carrier,

20. *J. W. Stewart & Son v. C. N. W.* 485, 487.  
*R. I. & P. Ry. Co. (Ia. 1915), 151*

it could not be held liable for negligence.<sup>21</sup>

In a typical case it was held that while it is ordinarily the duty of the consignee to receive the goods when tendered and dispose of the same for what can be procured for them, and thus minimize the loss, this applies where the commodity has a market value and can be readily disposed of for something of value; but where the article is second-hand, and of little or trifling value and unsalable, and after deducting for trouble and expense for handling the same there is so little left as to be insignificant and trifling and of no importance in value, the jury or judge can consider this in arriving at the damage done,<sup>22</sup> as excusing the consignee from accepting. A shipper finished loading and billed out a car of vegetables as Muscatine, Ia., destined to Kansas City, Mo., at 2:30 p. m., October 2, 1911. The carrier had a train leaving Muscatine for Kansas City at 5:57 p. m., on which a car of such freight, if ready, might have been taken. The vegetables were sent out on a train leaving Muscatine at 10:30 p. m., of the same day. The last mentioned train reached Eldon at 10:10 a. m. of October 3, where the shipper's car was set out. The car was there re-iced and remained in the Eldon yard until the next train leaving for Kansas City at 9:05 p. m. of October 3, and arriving at Trenton, Mo., at 8:35 a. m. of October 4. Leaving the last-named station at 10:05 a. m. of that day, it reached Kansas City at 8:05 p. m.; and at 7:00 a. m. of the following day, October 5th, it was placed at the team track in the railway yards, where it could be unloaded. When opened up at the team track, the railroad witnesses said the refrigerator was still two thirds full of ice. It appears, however, that after placing the car in position to be loaded on October 1 until sometime during the day or evening after it arrived in Eldon on October 3, the car was not re-iced. At the lowest calculation there were at least four or five hours after the car was billed and before it left Muscatine. According to the shipper's testimony, the time was more than seven hours.

21. *Kent v. C. of Ga. Ry. Co.* (Ga. 1915), 85 S. E. 1017; *Williams v. Central of Georgia Ry. Co.*, 117 Ga. 830, 43 S. E. 980; *Central of Georgia Ry. Co. v. James*, 117 Ga. 832, 45 S. E. 223;

*Ragsdale v. Southern Ry. Co.*, 119 Ga. 627, 46 S. E. 832; *Gilleland v. L. & N. R. Co.*, 119 Ga. 789, 47 S. E. 336; *Southern Ry. Co. v. Toller-son*, 135 Ga. 74, 68 S. E. 798.

22. *Poore v. Southern Express Co.*, (S. C. 1915) 86 S. E.

At Eldon, it required 5,000 pounds to fill the refrigerator. It appeared that under ordinary conditions a shipment of this kind from Muscatine ought to reach its destination in twenty-four hours; and that although the bill of lading did not require the carrier to take the car by any particular train, it was still bound to act in the premises with reasonable promptness and whether it did so act was a question of fact for the jury. A verdict of the jury for the plaintiff was sustained.<sup>23</sup> At 5 p. m., on Tuesday, April 8, 1913, a shipper delivered to the carrier at Moreland, Ky., for shipment to the Union Stockyards in Cincinnati, Ohio, three car loads of cattle. The cattle which were not accompanied by the shippers, were not delivered to the consignees until 1:45 p. m. on Wednesday, the 9th of April. In the ordinary course of transportation the cattle should have been delivered at the stockyards at 7 or 8 o'clock in the morning of Wednesday, which would have been in time for the sale of cattle on that day. As it was, they were not received until the sales on Wednesday were over, and consequently the shippers sustained a loss of \$311.41. Held, that it was the duty of the carrier to explain the delay satisfactorily and not having done so the verdict should be sustained since the delay was unreasonable and unnecessary on its face.<sup>24</sup> A carrier is liable for an unexplained delay of 28 days in the average schedule time in the transportation of a shipment.<sup>25</sup> In a suit for damages against a terminal carrier for delay in transporting a corpse, where the only evidence of a delivery of the corpse by the receiving carrier to the terminal carrier is found in the shipper's statement that, as the terminal carrier's train was leaving the depot at Washington, he saw the coffin on a truck, in the absence of any evidence showing a course of dealing between these carriers by which placing and leaving a coffined body on a depot truck in the neighborhood of the terminal carrier's track constituted a tender or delivery to it for immediate transportation over its line, no inference can justly arise of a default on its part.<sup>26</sup> But in such a case the burden of

23. *Blessing v. C. R. I. & P. Ry. Co.*, (Ia., 1915), 150 N. W., 661.

24. *Cincinnati, N. O. & T. P. Ry. Co. v. Myers*, (Ky. 1915), 178

S. W. 1038, 1039.

25. *Detmer-Wallen Co. v. D. L. & W. R. Co.*, 153 N. Y. S. 287.

26. *Southern Ry. Co. v. Renes*

proof was upon the shipper to show a tender or delivery of the corpse by the receiving carrier to the terminal carrier in reasonable time for transportation on the shipper's train, as an essential foundation for the breach of duty charged; and, failing to do this, as was the case, a peremptory instruction should have been given for the carrier as requested.<sup>27</sup> Where a corpse was shipped over connecting lines of a railroad, and the train on the terminal carrier left five minutes after the arrival of the preceding carrier it is not chargeable with damages for delay from failure to receive the transportation of a corpse consigned to it and which was on such train.<sup>28</sup> Since the liability of the initial carrier is for any default whatever of any connecting carrier it is obvious its liability does not terminate with arrival at destination. There may be a delay in delivering as distinguished from a delay in transporting. A contract for transportation of freight includes its reasonable delivery. Reasonable delivery depends upon the conditions existing at the place where the delivery is to be made. Ordinarily the small dealer or manufacturer receives and delivers his freight at the railroad company's warehouse, docks, or sidings. The manufacturer, who from time to time receives or ships car loads of freight, arranges with the company for a siding, and the freight is delivered at the consignee's siding, or at a particular factory within his works. Under ordinary circumstances such delivery is reasonable, and being generally accorded, it may be required by all similarly situated. By making such deliveries the company does not, however, bind itself to do the impossible, or to make deliveries at other factories where the conditions make such delivery impracticable.<sup>29</sup> So it is the duty of common carriers to maintain reasonable and proper facilities for the interchange of traffic, and for transferring, switching and delivering without unreasonable delay or discrimination freight or cars destined to any point on their tracks or any connecting line, and the undertaking of the railroad to transfer a car from one switching point to another im-

(Ala. 1915) 68 So. 987, 989.

27. Southern Ry. Co. v. Renes

(Ala. 1915) 68 So. 987, 990.

28. Southern Ry. Co. v. Renes,

(Ala. 1915), 68 So. 987, 990.

29. N. Y. C. & H. R. R. Co. v.

Gen. Elec. Co., 153 N. Y. S., 478, 485.

poses upon it the obligation of delivering the car to connecting lines without unreasonable delay; and, if it fails in this, and as a proximate consequence the goods became water-soaked and thereby damaged, it is liable. If, on the other hand, it delivers the car without unreasonable delay, and the delivering carrier, unreasonably delays in delivering the car and as a proximate consequence the goods are water-soaked and damaged, a case of liability is shown.<sup>30</sup> In the absence of evidence explaining or excusing a delay, delay in transferring the car from one warehouse to the other where switching is required, is unreasonable as a matter of law.<sup>31</sup> In a typical case a carrier received an order to transport a car of chops from the warehouse of the consignor to the warehouse of the consignee, the two warehouses being in the same railroad yards. The car was not delivered until three days after the order was given. There was evidence to the effect that the shipment was in good condition when delivered to the initial carrier, and that no rain had fallen on it until 57 hours after the order to transport was given. Held, this evidence was sufficient to go to the jury on the question as to whether the car had been negligently delayed.<sup>32</sup> A rather unusual case was one in which an initial carrier held a shipment of roofing in transit for failure of the delivering carrier to pay its charges. While the shipment was held at the junction point the consignee notified the initial carrier that the roofing was needed to cover certain lumber which required to be covered for protection from the elements. The initial carrier refused to deliver the shipment to the delivering carrier for several days, during which period rain fell which damaged the lumber. Held, that the initial carrier was liable for the special damages resulting, since the damages could have been avoided by delivering the goods to the connecting carrier after the carrier received notice of the use to which the roofing was to be

30. *L. & N. R. R. Co. v. Jones*, 100 Ala. 263, 14 South. 114; *Mt. Vernon Co. v. A. G. S. R. R. Co.*, 92 Ala. 296, 8 South. 687; *Southern Express Co. v. Saks*, 160 Ala. 621, 49 South. 392.

31. *C. & W. R. R. Co. v. Luden*, 89 Ala. 612, 7 South. 471. *Veitch v. I. C. R. R. Co.*, (Ala. 1915), 68 So. 575, 577.

32. *Veitch v. I. C. R. R. Co.* (Ala. 1915) 68 So. 575.

placed, and the probable consequences of such failure. The consignee's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithlessness of the carrier's agent, at a time when the consequences thereof were fully disclosed.<sup>33</sup> So a provision in the bill of lading that the owner or consignee should pay the freight before delivery does not authorize the initial carrier to hold the freight in transit until the delivering carrier pays its charges.<sup>34</sup> An initial carrier has no right to hold through freight until the connecting carrier pays its charges, especially where it had the right to demand pre-payment of charges and did not do so, as the interests of the public require that common carriers settle their disputes either by agreement in the courts or before the Railway Commission. Shippers should not be subjected to delay and damage because of these disputes.<sup>35</sup> In this case special damages were awarded because delivery was delayed after the carrier was given notice such damages would accrue. In another typical case a claimant shipped hogs from Kincaid, Ill., to National Stockyards at East St. Louis. The stock was loaded after 11 o'clock in the forenoon, arrived in East St. Louis about 5:30 o'clock the next morning and placed on the tracks of the Stockyards Company at 7:50 o'clock that morning, about a quarter of a mile from the unloading chutes where they remained until a little after noon, when they were unloaded at these chutes. The market for that day closed at 12 o'clock noon. Five of the hogs were found dead at the time they were unloaded and others were not in good shape. It was apparent from the evidence that this condition was caused, partially at least by the heat. The proof tended to show that all the hogs, because of the condition in which they were received, had depreciated in weight, and the

33. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Texas 1915), 178 S. W., 858.

34. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Texas 1915) 178 S. W., 858, 862.

35. *Railway Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 622; *Railway Co. v. Lone Star Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Texas 1915) 178 S. W. 858, 860.



shipper was compelled to accept a lower price on a declining market because he could not sell in the forenoon of the day when they arrived in East St. Louis. The proof tended to show that shipments of the same kind from Kincaid, Christian county, to East St. Louis, were usually switched and placed at the chutes in question some time between 7 and 9 o'clock the morning after they were shipped from Kincaid. Held, that the verdict of a jury in favor of the shipper would not be disturbed on appeal.<sup>36</sup> One common method to prove a reasonable schedule is for a shipper to address a letter to the carrier asking what time it will take to transport a shipment between the specified points. Since carriers are always eager for freight a reply is generally forthcoming, which of course is admissible. The doctrine of the liability of the carrier for delay is being very broadly construed, so it has recently been held that where neither the carrier nor shipper had any knowledge that a shipment of beans was in an abnormal condition and would spoil after being in a closed car, after four or five days, the carrier is liable for damage to the same caused through negligence in failing to transport the shipment within a reasonable time although such delay would not have caused damage to beans in a different condition.<sup>37</sup> And a railroad is not excused from a penalty provided for not promptly transporting freight by a rule of the State Railroad Commission, which excepts Sundays and legal holidays, where the shipment could have been transported on a Monday and was not because the preceding Sunday was a legal holiday, and the custom in such cases was to observe the following day also as a holiday.<sup>38</sup>

The importance of prompt transportation under modern commercial methods is apparent when it is considered that only recently a court laid down the doctrine that for unreasonable delay in transit, the purchaser of goods has a right to rescind the sale and the seller has a right of action against the carrier.<sup>39</sup>

36. *Fesser v. C. & I. M. Ry. Houston & T. C. R. Co.*, (Tex. Co., (Ill. 1915), 108 N. E. 709, 710. 1915), 179, S. W. 306.

37. *Lyons v. Grand Trunk Ry. Co. of Canada*, (Mich. 1915), 152 N. W., 88, 89. 39. *Isbel-Brown Co. v. Stevens Grocer Co.* (Ark. 1915) 175 S. W. 1158, 1159.

38. *Consumers' Lignite Co. v.*

Furthermore, where delay in the delivery of a shipment causes the consignee a loss equivalent practically to its value he may refuse to receive it.<sup>40</sup> The entire matter seems however, to be authoritatively settled by a recent decision of the United States Supreme Court. Carriers often defend claims for loss due to delay on the ground that the uniform bill of lading provides that the carrier does not agree to transport the shipment by any particular train or in time for any particular market.<sup>41</sup> There is some diversity of opinion among the state courts whether such a provision is valid. It has been held that in an action for negligent delay in the transportation of livestock it is proper for the court to refuse to charge the jury that the carrier is not required to move cattle within any particular time or for any particular market. On the other hand it has been said if there has been unreasonable delay in a shipment of live stock caused by the negligence of the carrier or by its servants, proximately resulting in loss and damage to the owners, stipulations in the live stock contract that they were not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, and to be fed and cared for at the owner's expense, while in the carrier's hands, does not furnish a ground for the carrier for avoidance of liability, for, while not under obligation to transport the live stock to destination in any specified time it was its duty to transport them within a reasonable time, for a negligent breach of which duty it may be held liable for the resulting loss and damage.<sup>42</sup> The method of proving what is a reasonable time for transportation is not necessarily the puzzling question it is supposed to be. Previous shipments made by the carrier between the same points, schedules published by the carrier, statements by its agents as to the time of transportation, experience of other shippers from the same locality, are all competent evidence to show what is a reasonable time. Very recently it was held that in an action for injuries through delay it is competent evidence for the shipper to

40. *Central of Georgia Ry. Co. v. Goodwater Mfg. Co.*, 69 So. 344. *Bowers & Son*, (Tex. 1915), 175 S. W., 861, 862.

41. *G. C. & S. Ry. Co. v. J. A. Ry. Co.* (Mo. 1915), 173 S. W. 61 62. 42. *Hunt v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 61 62.

prove that a shipment made by another shipper from the same point of origin arrived at destination a day earlier.<sup>43</sup>

The case of the *N. Y. P. & N. R. R. Co. v. Peninsula Produce Exchange of Maryland*, 240 U. S. 34, <sup>43½</sup> finally settles one of the disputed questions of section three of the uniform bill of lading. Section three provides among other things as follows: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon." Attorneys for shippers have always contended that this provision really did not mean anything.

43. *Norfolk & W. Ry. Co. v. A. J. Steele & Son* (Va. 1915), 86 S. E. 124, 127.

The time required by a common carrier other than the defendant to transport goods between two points is evidence of the time that ought to be taken by the defendant. *Engemann v. Delaware, L. & W. R. Co.* (N. J. 1916) 97 Atl. 152.

Evidence that a shipment of live stock arrived several hours later than usual time taken in connection with testimony of the shipper that he took a passenger train after live stock train and did not see any washout or cause for delay makes a prima facie case for delay on the part of the carrier. *Sikes v. St. Louis & S. F. R. Co.*, (Mo. 1915) 176 S. W., 255.

A common carrier is bound to deliver the property which he undertakes to transport at the point of discharge safe and uninjured at the peril of liability, except where the injury has resulted from some cause excepted in a contract (other than negligence), which is a matter of defence, the onus of proving which is upon the carrier. The shipper has nothing

to do but to show the injury, and the carrier becomes at once prima facie liable, and remains so until he shows that said injury resulted either from an act of God, the public enemies, or a cause from which he had exempted himself legally in a special contract. Also see *Johnstone v. Railroad*, 39 S. C. 55, 17 S. E. 512. *Piero v. Southern Express Co.* (S. C. 1916) 88 S. E. 269, 271, 272.

In an action instituted by a shipper of perishable goods against a common carrier, on account of the defendant's breach of duty to safely and promptly transport the goods and deliver the same to the consignees at destination, where it is alleged that the carrier received the shipment in good order, and did not properly take care of the goods, and did not safely and securely carry and convey them, and did not deliver them in good order, particular acts of negligence need not be alleged. *Louisville, etc., R. Co. v. Warfield & Lee*, 129 Ga. 473, 59 S. E. 234. *Louisville & N. R. Co. v. McHan* (Ga. 1916) 87 S. E. 889, 890.

<sup>43½</sup>. 36 Sup. Ct. 230; 60 L. Ed—

The carrier's liability at common law was to transport the goods within a reasonable time. It was held that what was a reasonable time was a question for the jury to decide after taking into consideration all the facts of the case. Thus in the case of perishable produce, a reasonable time would mean greater expedition than in the case of coal. The carriers however have taken refuge behind this provision in the bill of lading in declining claims for delay. The facts in the case were as follows: On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The property was delivered at destination some hours later than the customary time of arrival and suit was brought to recover damages for failure to make the market. On the ground that by failing to make the market, the railroad did not transport with reasonable dispatch, the shipper secured a judgment in the court of appeals of Maryland, 122 Md. 215, 89 Atl. 433. An appeal was taken to the Supreme Court of the United States on two questions which were as follows: 1. Does the Carmack amendment impose on the "initial carrier" liability for delay occurring on the line of its connection without physical damage to the property? 2. Was the shipper entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, which provided that: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon." The Supreme Court held that under the Carmack amendment the initial carrier was just as liable for damages due to delay on the line of a connecting carrier as for any other damage. Concerning the second question, that is, liability for failure to meet the market, the court said that it was the duty of the jury to award damages for failure to transport with reasonable dispatch and if the jury found that it was not reasonable dispatch to make the market on a certain date, it was justified in awarding damages for such failure. The Supreme Court, however, did not directly pass on what would

be the correct measure of damages. It appeared that in the trial court a wrong measure of damages had been used but the case was not reversed on this account because the state court held the the railroad had not been injured by using the wrong measure of damages and the Supreme Court of the United States held that the determination of this question involved no federal question. The correct measure of damages in case of a delay in transit which results in a decline in the value of shipment on arrival is, under the uniform bill of lading, the difference between the invoice value of the shipment at the time and place of shipment and the market value of the shipment upon arrival, plus the freight charges if prepaid.<sup>44</sup>

**3. Loss by Fire.** Very often cars burn either while awaiting transportation or while awaiting delivery. In the former case it has been held that where a shipper owning an ele-

44. The state decisions generally affirm the doctrine that carriers of live stock and perishable produce are held to a stricter schedule of transportation than in the case of other freight.

The fact that shippers rely on reaching a certain market by a definite time is also of considerable weight.

Hunt v. St. L. I. M. & S. Ry. Co.,  
(Mo. 1915) 173 S. W., 62.

Wall v. N. P. Ry. Co. (Mont.  
1914) 145 Pac., 291.

Watson v. U. P. R. R. Co. (Mo.  
1915) 178 S. W., 871.

Karr v. B. & O. R. R. Co. (W. Va.  
1915) 86 S. E., 43.

Blessing v. C. & T. P. Ry. Co. (Ia.  
1915) 150 N. W., 661.

C. N. O. & P. Ry. v. Myer (Ky.  
1915) 178 S. W., 1038.

Velch v. I. C. R. R. (Ala. 1915)  
68 So., 575.

G. C. & S. Ry. Co. v. Bowers &

Son, (Tex. 1915) 175 S. W.,  
861.

Hunt v. St. L. I. M. & S. Ry.,  
(Mo. 1915) 173 S. W., 61.

Norfolk & Western Ry. Co. v.  
Steele & Son, (Va. 1915) 86  
S. E. 124.

Lyons v. G. T. Ry. Co., (Mich.  
1915) 152 N. W., 88.

The foregoing cases discuss the provision referred to in the bill of lading and hold that while the carrier is not an insurer of a schedule, it is nevertheless bound to transport with reasonable promptness and whether it does so in a particular case is a question of fact for the jury.

It has also been held that in an action for injury through delay, it is competent evidence for the shipper to prove that a shipment made by another shipper from the same point of origin arrived at destination earlier. Norfolk & W. Ry. v. Steele & Son (Va. 1915 86 S. E., 124,

vator situated on a switch track, loaded a car with corn, which the carrier moved to a convenient point for placing in its train, where it was destroyed by fire over night, there is a delivery to the carrier, and it is liable for the loss although no bill of lading was in fact issued. The Carmack Amendment, although providing that a bill of lading shall be issued, does not provide that liability shall not attach until issued.<sup>45</sup>

4. **Damage by Flood.** As previously noted a flood is not necessarily an Act of God, so as to relieve a carrier from liability. Only recently it was held that where freshets were to be expected at certain seasons of the year the fact that freight was damaged from a tremendous flood although not an unprecedented one was not such an Act of God as relieved the carrier from liability.<sup>46</sup>

45. *Morrison Grain Co. v. M. P. Ry. Co. (Mo.)*, 170 S. W. 404.

It has been held that the failure of a carrier to move a carload of lumber after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault. *Greene v. Louisville & N. R. Co.*, 163 Ala. 138. *Moore on Carriers*, 3rd Ed., p. 320.

But it has also been said that a common carrier is not liable for injury to a shipper's goods by a fire, for which it was not responsible, although the goods were exposed to injury by negligent delay in transmission, as the delay cannot be deemed the proximate cause of the injury. *Moore on Carriers*, 2nd Ed., p. 318; and cases cited.

46. *International & G. N. Ry. Co. v. Penney*, (Texas 1915), 178 S. W. 970, 971.

A carrier is not liable for loss or

damage to goods while in its possession, occasioned through an act of God, such as a flood; but the act of God which would excuse a common carrier for loss of or injury to goods must be the immediate or proximate, and not the remote cause of the loss. *Moore on Carriers*, 2nd Ed., p. 318.

But it is not essential to the exemption of a carrier from liability for loss of or injury to goods during their transportation, that the damages result solely from any one of the exceptional causes, such as the act of God or a public enemy, or the sole fault of the owner, it not being liable if two or all of such causes combine to produce the injury, if the carrier itself is without fault. Where a common carrier merely fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability, the act of God, and not its negligence, being the proximate cause. *Moore on*

5. **Loss Through Freezing.** Considerable controversy has arisen concerning liability for loss occasioned by freezing. Some shippers believe that the carrier is liable for all such dam-

Carriers, 2nd ed., p. 318; and cases cited

Whether the loss of Goods intrusted to a common carrier is to be attributed to inevitable necessity not arising from the intervention of man and which no human prudence could have avoided, is a question of fact for the jury. Moore on Carriers, 2nd ed. p. 319.

Other instances pro and con are as follows:

As between a failure without proper cause to deliver goods from a freight depot upon demand at a time when there was no reasonable ground to apprehend damage by flood and an unprecedented flood which a day later submerged the depot and damaged the goods, the flood, and act of God, and not the failure to deliver, was the proximate cause of the damage.

Atchison, etc., Ry. Co. v. Henry, 78 Kan. 490, 97 Pac. 465, 18 L. R. A. (N. S.) 177.

Where the flood which injured a shipment of eggs appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight it was the proximate cause of such injury, and negligent delay if any, of the carrier in transporting the eggs, whereby they were exposed to the flood, was but the remote cause.

Lightfoot v. St. L. & S. F. R. Co. 126 Mo. App. 532, 104 S. W. 482.

A carrier is not liable for a loss

of property in shipment through an act of God, which could not reasonably have been foreseen, although but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger, and the loss would not have occurred. In such case the negligence is not the proximate cause of the injury.

Empire State Cattle Co. v. Atchison, etc., Ry. Co., 135 Fed. 135, judg. aff'd 147 Fed. 457, 77 C. C. A. 601, and 147 Fed. 457, 77 C. C. A. 607.

Delay of a carrier in transporting goods, whereby they come in the path of a flood, and are destroyed by an act of God, is not a proximate cause of their injury.

Elam v. St. L. & S. F. R. Co., 117 Mo. App. 453; 93 S. W. 851.

Negligent delay of a carrier in moving goods, not so unreasonable as to amount to a conversion, will not render it liable for the loss of goods after they have been carried to their destination and are there destroyed by an act of God before their delivery.

Rodgers v. Missouri Pac. Ry. Co. 88 Pac. 885.

Where the negligence of a carrier operates as a contributive element proximate to injury to goods, even though such injury is to some extent caused by the act of God, the carrier is liable as though the negligence was the entire cause of the loss.

ages. On the other hand many carriers contend that freezing is an act of God which relieves them from liability. A great many freezing claims arise in the case of shipments of perishable produce moving in ventilator cars. If the shipper directs that the vents be left open and the goods are frozen as a result, the car-

Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co., 124 Mo. App. 545, 102 S. W. 11.

Where a consignment of flour was delivered to a carrier for shipment and was retained four days before being forwarded, the carrier was liable for the damage caused by a cyclone on the morning of the next day after its arrival at its destination, since the negligence of the carrier, resulting in the delay at the place of shipment, continued to be an active cause until the consignee had a reasonable time after their arrival within which to remove the goods.

Alabama G. S. R. R. Co. v. J. A. Elliott & Son, 150 Ala. 381; 43 So. 738, 9 L. R. A. (N. S.) 1264.

In Bell vs. Pac. R. Co. 177 Ill. App. 374 it was held that there was negligence of the carrier in the failure to properly care for cattle shipped from Rock River, Wyoming to South Omaha, Nebraska. A severe snow storm delayed the shipment enroute causing the loss of some of the cattle and depreciation of the rest. Some of this loss could have been prevented by greater care of the carrier and a judgment for the shipper was sustained on the ground that the severe snow storm, though an act of God and the proximate cause of the damage, was so mingled with the neg-

ligence of the carrier as not to relieve the railroad from liability.

On February 12, 1907 the E. M. Leonard Produce Co. shipped a car of potatoes from Ault, Colorado, to Los Angeles, California. There was a delay in transshipment to a connecting carrier of four days at Salt Lake City so that the car was not moved from Salt Lake City until February 22nd, and was stopped at Lund, Utah, by a wash out on the line which occurred there on the 22nd. The Court held that under the stipulated facts the car would have reached Ault, Utah on the 18th or 19th but for the negligence of the carrier and sustained a judgment for the shipper over the defense of an act of God.

Leonard Produce Co. vs. U. Pac. R. Co. 180 Ill. App. 415.

Where the baggage of a passenger from Cincinnati to New York was by error of the carrier forwarded by a slow train when it should have been sent on the through express and the train containing the baggage was overtaken by an unusual and unexpected flood by which the baggage was destroyed the court held that:

"The Act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause.

And where the loss is caused by



rier claims that the damage is the fault of the shipper. If the shipper directs the vents be kept closed and the weather turns warm suddenly, the produce heats and as a result spoils, then it

the Act of God if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In line with this principle many authorities hold that where the unnecessary delay of the carrier subjects the goods in his possession to a loss by an Act of God which they would not otherwise have met with, the delay is of itself such negligence as will make him liable for the loss. We are inclined to think that this is the correct doctrine.

*Wald vs. Pittsburgh C. C. & St. L. R. R. Co.*, 162 Ill. 545.

In *Ormsby vs. Union Pacific R. Co.* 2 McCrary (U. S.) 48 Fed. 705, a delay of one day was held to be unnecessary and negligent on the part of the carrier and to entitle the shipper to judgment for the loss.

"The loss must be the proximate result of a cause as to which the carrier has exempted himself from liability in order that he shall be relieved under such exemption and the excepted cause of liability must be the sole cause of the loss, for if the negligence of the carrier mingles with it as an active and co-operative cause the carrier will be responsible."

Also see 6 Cyc. 397 and note 90.

In *Green-Wheeler Shoe Co. vs. Chicago, Rock Island & Pacific Railroad Company* reported in 5 L. R. A. (N. S.) 882; 106 N. W. 498, an Iowa case, the point is squarely

decided and thoroughly considered. The Court Said:

"We have presented for our consideration the simple question whether a carrier who by a negligent delay in transporting goods, has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss. \* \* \* In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach.\* \* But in an action of tort, and the present case is of that character, recovery is not limited to the consequences within the contemplation of the parties, or either of them but includes all the consequences 'resulting by ordinary natural sequence, whether foreseen by the wrong doer or not, provided that the operations of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued'. \* \* Now

is also claimed that this is the fault of the shipper. However, a shipper of perishable produce is justified in acting upon the belief that his shipments will be transported in the usual time

while it is true that the defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen as any reasonable person could foresee that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper.\* \* It is not sufficient for the carrier to say by way of excuse that, while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost, it might have subjected them to some peril just as great. He cannot speculate on mere possibilities."

To the same effect see the following cases:

*BibbBroom Corn Co. v. Atchison, T. & S. F. R. Co.*, 69 L. R. A. 509.

*National Rice Milling Co. vs. New Orleans & C. R. Co.*, 132 La. 615, 34 Ann. Cases 1099.

*Am. & Eng. Enc. of Law* (2nd Ed.) Vol. 13, Page 722.

*A. G. S. R. Co. vs. Elliott*, 150 Ala. 381 A. L. R. A. (N. S.) 1264.

*A. G. S. R. Co vs. Quarles* 145 Ala. 436, A. L. R. A. (N. S.) 867.

*Tate vs. Mo. Pac. Ry. Co.* 157 Ill. App. 105.

*M. C. R. Co. vs. Curtis*, 80 Ill. 324.

*G. So. R. Co. vs. Barfield*, 1 Ga. App. 203.

*Ferguson vs. Southern Ry. Co.* 74 S. E. 129, (S. C.)

*Ct. L. & S. F. Ry. Co. vs. Dreyfus*, 141 Pac. 773 (Okla.).

*B. & O. R. Co. vs. Keedy, et. al.*, 75 Md. 320.

*Fentiman vs. A. T. & S. F. R. Co.* 98 S. W. 939 (Tex.)

*Wabash R. Co vs. Sharper* 76 Neb 424.

The burden of proof is upon the carrier to show it is free from fault where the proximate cause of the loss was an Act of God. Where an Act of God causes injury to property in the hands of common carrier, and such act is the sole cause of such injury then the proof of such fact is a perfect shield. But if there be any negligence on the part of the carrier, which if it had not been present the injury would not have happened notwithstanding the Act of God the carrier cannot escape responsibility. And the onus is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause,

and as a matter of law it is not negligence for him to direct that the ventilators be kept closed to prevent damage by freezing.<sup>47</sup> So it is the duty of a carrier to apprehend that at certain seasons

because it is only when the act of God is the entire cause that the carrier can be shielded.

*Slater v. So. Carolina Ry. Co.*,  
29 S. C. 96, 6 S. E. 936.

*National Rice Milling Co. v. New Orleans & C. R. Co.*, 132 La. 615, 34 Ann. Cases 1099.

*Joliffe v. Northern Pacific R. Co.*  
100 Pac. 977.

*Hayes v. Kennedy* 41 Pa. 378.

*Graham v. Davis*, 4 Ohio State 362.

*Richmond & D. R. Co. v. White.*  
88 Ga. 805, 15 S. E. 802.

*Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394.

*McCarthy vs. L. & N. R. Co.* 102 Ala. 193.

*Central R. Co. vs. Mitchell* 91 N. E. 735 (Ind.)

*Read vs. Spalding* 30 N. Y. 630.

*Dunoon v. N. Y. C. R. Co.* 3 Lans. 265.

*Fentiman v. A. T. & S. Fe. R. Co.* 44 Tex. Civ. App. 455.

*Perkins v. C. C. C. & St. L. Ry. Co.*, 183 Ill. App. 531.

*Railroad Co. v. Summerour*, 139 Ga. 545.

*Prelly Co. v. R. Co.* 120 Minn.

*Lyon v. R. Co.* 165 N. C. 143.  
295.

*Union Express Co. v. Graham*,  
26 Ohio St. 595

*Adams Express Co. v. Stellan-ers*, 61 Ill. 184.

*Fentiman A. T. & S. F. R. Co.*  
98 S. W. 939 (Tex.)

47. *Watson v. Union Pac. R. Co.* (Mo. 1915), 178 S. W. 871, 872.

The general rule is that the freezing of goods of perishable nature while en route is an act of God for which the carrier is not liable unless caused by unnecessary delay in transportation or by careless exposure to the cold.

*Vail v. Pacific R. Co.*, 63 Mo. 230.

*Wolf v. American Express Co.*,  
43 Mo. 422, 97 Am. Dec. 406.

*Swetland v. Boston, etc., R. Co.*,  
102 Mass. 276.

*Wing v. New York, etc., R. Co.* 1 Hilt. (N. Y.) 235.

The carrier is liable where goods are frozen owing to its negligence either in shipping at a season of the year when a freezing spell might reasonably be anticipated or in not properly taking care of the shipment during freezing weather.

*Hewett v. Chicago, etc., R. Co.*,  
63 Iowa 611.

*Fox v. Boston, etc., R. Co.*, 149 Mass. 220, 19 N. E. 222.

*McGraw v. Baltimore, etc., R. Co.*, 18 W. V. 361, 41 Am. Rep. 696.

*Michigan Cent. R. Co. v. Burrows*, 33 Mich., 6.

*Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307, 29 Pac. 22.

*Pierce v. Southern Pac. R. Co.*,  
120 Cal. 156, 47 Pac. 874.

*Hinton v. Eastern R. Co.*, 72 Minn. 339, 75 N. W. 373.

However, it has been held that

of the year shipments of perishable produce are liable to freeze.<sup>48</sup> But where a shipment of perishable produce is made in a month when freezing weather is not unusual and the shippers direct the carrier to leave open a vent in the car, they can not recover for loss caused by severe but not unprecedented cold weather.<sup>49</sup> So a shipper of apples is bound by the act of his agent, whom he employs to haul the apples from his orchard to the railroad, in ordering the carrier to keep the vents open to destination, by reason of which the apples are frozen owing to a blizzard coming up while in transit.<sup>50</sup> However, the carrier must not contribute to the injury by any negligent act of its own. A carrier is liable for injuries to potatoes caused by

a carrier was not liable where fruit, for example, was delivered to it for shipment when the temperature was below freezing point on forwarding the fruit on date of receipt instead of retaining in storage until warmer weather.

*Tucker v. Pennsylvania R. Co.* 11 Misc. Rep. (N. Y.) 366, 32 N. Y. Supp. 1.

*Tierney v. New York Cent. etc., R. Co.*, 76 N. Y. 305.

But a carrier is not responsible for a loss or injury incurring from any inherent, natural infirmity or tendency to damage or depreciation or decay of the goods in the course of transportation or caused by some act of the shipper.

*B. F. Schwartz & Co. v. Erie R. Co.*, 32 Ky. Law Rep. 777, 106 S. W. 1188.

*Carpenter v. Baltimore & O. R. Co.*, 6 Pen. (Del.) 15, 64 Atl. 252.

*McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696.

*Abilene & S. Ry. v. Ward*, (Texas 1915) 178 S. W. 638.

Of course, the carrier must furnish suitable means of transportation and must use proper care to transport the commodity safely to destination. This obligation means that the commodity must be properly safeguarded from weather conditions during transit. In case the kind of appliance ordered by the shipper is furnished because it is assumed by him that such a car will carry the commodity safely through to destination, the fact that it does not is not the negligence of the carrier but the misfortune of the shipper. The carrier has done everything necessary for it to do and cannot be charged with negligence.

<sup>48</sup> *Young v. Maine Cent. R. Co.* (Me. 1915), 93 Atl., 48, 50.

<sup>49</sup> *Abilene & S. Ry. Co. v. Ward* (Texas 1915) 178 S. W., 638, 641.

<sup>50</sup> *Abilene & S. Ry. v. Ward*, (Texas 1915), 178 S. W. 638, 340.

freezing in spite of the fact that the bill of lading contains a notation that the shipper assumes the risk of freezing, where the shipment was delayed four days in transit, as the carrier cannot exempt itself from liabilities through negligence. A carrier cannot excuse delay in transporting freight on account of shortage of cars and unprecedented amount of business, where it accepts a shipment without notice of such facts to the shipper.<sup>51</sup> And a carrier of potatoes, which was in charge of the loading and transportation, is liable for injuries from freezing,<sup>52</sup> especially where the evidence showed there was no straw in the car or any other precaution to anticipate changes in temperature.<sup>53</sup> A carrier of bananas under contract whereby a messenger traveled with the shipment to advise regarding its protection against cold, which carrier twice disregarded the messenger's request en route to house the bananas, could not escape liability on the ground that the messenger did not ask that the fruit be protected at destination after they had been exposed to low temperatures and were frozen.<sup>54</sup>

While the rule is well established that in the event of an unreasonable delay in the carriage of goods the carrier will be held liable for all losses or damages consequent thereon, yet the mere fact that a delay has occurred is not sufficient to charge a carrier, unless it appears that such negligent act was in truth the proximate and not merely the remote cause of loss. It may be held, taking into account the nature of the property, its liability to be injured by freezing weather, the distance from the point of shipment to the place of destination, the favorable condition of the weather when the property was delivered to the carrier, and its liability to change at that season of the year, that the carrier was liable for damage to the property because the delay was the immediate and proximate cause of

51. *Daoust v. Chicago, R. I. & P. R. Co.*, 149 Iowa 650, 128 N. W. 1106, 34 R. L. A. (N. S.) 637; *Unionville Produce Co. v. Chicago B. & Q. Co.*, 168 Mo. App. 168, 153 S. W. 63; *Missouri K. & T. Ry. Co. v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410. *Young v. Moine Cent. R. Co.* (Mo. 1915), 93

Atl., 48, 49.

52. *St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co.*, (Ark. 1915), 177 S. W. 400.

53. *St. Louis, I. M. & S. R. Co.* (Ark. 1915), 177 S. W. 400, 401.

54. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

that damage.<sup>55</sup> So it may be stated that while a shipper of live stock, in tendering cattle for shipment is aware of weather conditions and assumes the risk of such conditions, yet the railroad has possession of the shipment as a common carrier and is required to exercise a degree of care that a reasonable, cautious, and prudent man would, under like circumstances.<sup>56</sup> In a typical case of live stock injured by freezing it was held that in transporting a car of cattle, and shunting it on a side track the carrier was bound to exercise reasonable care in so placing it as not to unnecessarily expose the cattle to the inclemency of the weather, and, if it did place the car where it was unnecessarily exposed, it was a fair question for the jury whether the carrier exercised reasonable care to protect the stock while there, or, if the exercise of such care so required, to remove the cattle from the car if reasonably essential for their protection. Even though cattle might not freeze with the thermometer at 26 degrees above zero, when exposed to the wind moving at ten miles an hour, if allowed to remain in such condition a long time, it cannot be said that they might not freeze on the subsequent journey. The company was not required, as a matter of law to maintain a switch engine at its junction, but it was required to do all in the care of stock delivered to it for carriage reasonable and necessary for its proper care and protection, and whether it was bound to place the car in a position where it might be unloaded or remove it from its exposed condition in which it had placed it depended entirely upon the ordinary care which was exacted from it. Of course there might be circumstances under which cattle might freeze without fault on the part of the carrier, but in this case it was a fair question for the jury whether the defendant exercised ordinary care in the protection of the cattle during transportation, and, if it failed so to do, whether the cattle were injured and lost in consequence of such omission.<sup>57</sup>

**6. Refrigeration.** Very frequently shipments must move un-

55. *Young v. Maine Cent. R.* 327, 330.

*Co. (Me. 1915)*, 93 Atl., 48, 50.

57. *Golsch v. Chicago, M. & St.*

56. *Golsch v. Chicago, M. & St.*

*P. Ry., (Iowa 1915)*, 153 N. W. 327,

*P. Ry. Co., (Iowa 1915)*, 153 N. W.

330, 331.

der refrigeration. The law imposes upon carriers the duty of furnishing cars properly iced. In addition to this requirement there may be a contractual obligation as well to furnish an iced car at a certain time and place.<sup>58</sup>

When the carrier, however, furnishes the car, the shipper must use due diligence in loading particularly if the car is sent to a small town where there are no icing facilities. A typical case follows: A shipper of peaches who should ordinarily have loaded a car in 10 hours took 34 hours to do it, by which time the ice which had filled the bunkers melted so that it would no longer protect the shipment. The carrier receipted for the peaches as in apparent good condition. As soon as the car was loaded, it was taken to a re-icing station and at once re-iced. Held, that when the carrier sent the railroad car fully iced to a small place where there was no icing station, it had fulfilled the duties incumbent upon it and, if the shipper unnecessarily delayed the car until the ice had melted below the safety point, the carrier could not be held liable for the results.<sup>59</sup> However, it is incumbent on the shipper when he finds that the railroad has not complied with its contract to furnish an iced car to do all that he can to mitigate his damages, and, notwithstanding the fact that the car was not properly iced, the jury has a right to find that he pursued the proper course in loading his peaches, and in making all possible effort to get them to a market and dispose of them to the best advantage.<sup>60</sup> Once the cars are in the possession of the carrier, it is necessary for it to follow the route given by the shipper for icing and in case it deviates from the route it is liable for any damage whatever, no matter if caused by the act of the shipper or other agencies for which ordinarily the carrier would be relieved from liability. Thus a shipper of plums and peaches from Appleton, N. Y., to New York City, noted on the bill of lading to re-ice at Kendall and Karner. The carrier deviated its cars to its west shore division and re-iced at Frankfort in-

58. St. Louis, I. M. & S. Ry. Co. (Tex. 1915), 174, S. W., 714.  
v. Tilby, (Ark. 1915) 174 S. W., 1167, 1169.  
59. St. L. & S. W. Ry. v. Grant, 1167, 1169.  
60. St. Louis, I. M. & S. Ry. Co. v. Tilby, (Ark. 1915), 174 S. W., 1167, 1169.

stead of Karner. The provisions in a contract of affreightment for the re-icing of perishable fruit and naming the points at which such re-icing is to take place, are very substantial and important provisions of such contract. Where there is a deviation from the agreed route, the carrier becomes an insurer and cannot avail himself of any exceptions in the contract.<sup>61</sup> In the Maghee Case the court said: "When a carrier accepts goods to be carried with a direction on the part of the owner, to carry them in a particular way, or by a specified route, he is bound to obey such direction; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract." The deviation here destroyed the entire contract, including the above quoted provision and rendered the carrier liable for all damages to the shipment.<sup>62</sup>

**7. Rough Handling.** It must be remembered a carrier of live stock is only required to use ordinary care in their transportation.<sup>63</sup> But even though a train may move at a proper speed and make the trip on schedule time, this will in no manner relieve the company from the consequences of any negligence in the manner of caring for stock being transported during any necessary delay at stations or when moving on the road.<sup>64</sup> Where it appears that live stock are delivered in a sound or uninjured condition to the initial carrier and the stock is delivered to consignee at destination in an injured condition, a prima facie case is made against the carrier and the burden rests upon it to show that

61. *Maghee v. Camden & Albany R. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Johnson v. N. Y. C. R. R. Co.*, 33 N. Y. 610, 88 Am. Dec. 416; *Green-Wheeler Shoe Co. v. C. R. I. & P. R. Co.*, 130 Ia., 123, 106, N. W., 498, 5 L. R. A. (N. S.), 885, 8 Ann. Cas. 45.

62. *McKahan v. American Ex. Co.*, 209 Mass. 270, 95 N. E., 785, 39 L. R. A. (N. S.) 1046, Ann. Cas. 1912B, 612; *Thorley v. O. S. S. Co.*

(1907) 1 K. B. 660; *Klish v. Taylor* (1911) 1 K. B., 625; *I. G. v. Macandrew & Co.* (1909) 2 K. B. 360; *Balian & Sons v. Joly, Victoria & Co.*, 6 T. L. R. 345. *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S., 633, 637.

63. *Houston & T. C. R. Co. v. Lindsey*, (Tex. 1915), 175 S. W., 708, 711.

64. *Golsch v. Chicago M. & St. P. Ry. Co.*, (Iowa 1915), 153 N. W. 327, 329.



such injured condition resulted from the inherent nature or natural propensities of the animals.<sup>65</sup> The liability of a carrier of goods does not cease until the goods are unloaded from the car and delivered to the consignee, or placed in a storehouse provided for that purpose, and, where the character of the shipment is such that it would be impracticable to place it in the carrier's storehouse, the carrier's liability as such, and in the absence of contract providing otherwise, continues until the car is located at destination, where such cars are usually unloaded, or at some convenient place at the request of the consignee.<sup>66</sup> Of course, under the federal act known as the Twenty-eight Hour Law, (printed in the appendix), the carrier is bound to unload cattle and feed, water and rest them for five hours.<sup>66½</sup>

65. *Gulf, C. & S. F. Ry. Co. v. King*, (Texas 1915), 174 S. W. 960, 962.

Evidence that a carrier's stock pen at a division point was muddy, that a shipper's cattle were compelled to drink muddy water, and had difficulty in getting sufficient water, and could be fed only by throwing the hay upon ground, without any showing of injury to the cattle, is insufficient to sustain an action against the carrier. *Patterson v. Chicago & A. Ry. Co.* (Mo. 1916) 182 S. W. 1034, 1035.

In an action for damages to a shipment of cattle, where it appeared that during transportation some of the cows calved prematurely, evidence as to whether rough handling and jolting during the transit would cause such calving, in view of evidence upon which the jury might find rough handling and jolting, was admissible to prove a cause of the calving. *Greening v. Chicago & N. W. Ry. Co.* (Mo. 1916) 183 S. W. 1121.

66. *Chicago, R. I. & P. Ry. Co.*

*v. Stouffer*, (Ind. 1916), 111 N. E. 809.

66½. Act June 29, 1906, c. 3594, §1, 34 Stat. 607 (Comp. St. 1913, §8651), provides that no railroad, whose road forms any part of a line of road over which animals shall be conveyed from one state or territory into or through another state or territory, shall confine them for longer than 28 consecutive hours without unloading them for rest, water and feeding. A shipment of horses from a point in Ontario, Canada, to a point in British Columbia, passing through Michigan and Illinois en route, was confined in excess of 28 hours while being transported from a point in Michigan into and through the state of Illinois to a point therein where the animals were unloaded. Held, that this constituted a violation of the statute, the point of origin of the shipment and its final destination not being material. *Grand Trunk Ry. Co. v. United States*, 229 Fed. 116.

Where, in an action for dam-

ages to an interstate shipment of cattle from delay in transportation, it appeared that the cattle were given the rest required by the federal 28-hour law, and that claimant's right to recover was based on the carrier's failure to give additional time for rest, the carrier's liability depended on the terms of the shipping contract and duties arising therefrom by operation of law; and hence the carrier's failure to give the additional time anticipated by the shipper did not render it liable in the absence of a contract stipulation relative to such additional time. *Kent v. Chicago, B. & Q. R. Co.* (Mo. 1915) 176 S. W. 1105.

In an action by shippers of live stock for delay in transit, where the shipment was interstate and required at least 60 hours to make, the jury should have been instructed with reference to the requirements of the federal law as to the unloading of cattle for resting, watering and feeding. *International & G. N. Ry. Co. v Landa & Storey* (Tex. 1916) 183 S. W. 384.

In an action by shippers of live stock for delay in transit, where the claimants read in evidence part of the contract of shipment, the clause that the live stock were not to be transported within any specified time, etc., not contrary to the federal statute touching the watering, etc., of live stock in

transit, and not an attempt to contract against the carrier's negligence, was admissible as showing the entire contract. *International & G. N. Ry. Co. v Landa & Storey* (Tex. 1916) 183 S. W. 384.

The federal acts, declaring that, save under specified circumstances a shipment of live stock shall not be confined to the cars for more than 28 consecutive hours, did not abrogate the duty of the common carrier to feed, water, and rest the animals as reasonable necessity might require, but merely provided a maximum beyond which stock could not be confined; therefore a carrier cannot justify its act, in confining stock without food and water for an unreasonable period of time, on the ground that it was within the maximum prescribed by statute. *Texas & P. Ry. Co., v McMillen* (Tex. 1916) 183 S. W. 773.

Where an interstate carrier's filed tariffs for the transportation of animals provided for feeding in transit and prescribed particular prices for feed when animals were held for a greater or less time than 15 days, there being no limitation on the time, a carrier's contract to feed animals in transit without reference to time would be valid if the same privilege was allowed to all shippers. *Klink v Chicago, R. I. & P. Ry. Co.*, 219 Fed. 457. 458.

#### **IV.**

#### **LIABILITY AFTER ARRIVAL AT DESTINATION**

##### **A. CIRCUMSTANCES JUSTIFYING RECOVERY.**

1. **Negligent Acts in General.**
2. **Notice of Arrival.**  
—Notice to Consignor.
3. **Consignee's Right to Inspect.**
4. **Conversion.**
5. **Concealed Loss.**
6. **Dispute Over Charges.**
7. **Fire.**
8. **Misdelivery.**  
—Acceptance By Consignee.
9. **Order Notify Shipments.**
10. **Right to Sell.**
11. **Warehousing.**
12. **Baggage.**

1. **Negligent Acts in General.** Not only is the carrier liable for negligence during transit but it may be guilty of negligent acts after arrival for which it is responsible. If it improperly stores the freight, or does not take the right care of it, it is responsible. So where a carrier of live stock agrees to dip cattle in an arsenic dip, it is liable if it fails to properly clean its pens in which it had given them a petroleum dip so that the oil left in the pens mixes with the arsenic and thereby injures the cattle.<sup>1</sup>

2. **Notice of Arrival.** After the carrier has brought the goods to destination the weight of authority seems to be that it is its duty to give notice to the consignee that the goods are on hand. But in several states it is held that the carrier has discharged its duty as such when it has transported the goods to the place they

1. *Missouri, K. & T. Ry. Co. v. S. W.*, 880.  
*Texas v. Cauble* (Texas 1915) 174

were destined to, that it is the duty of the consignee to be there to receive them, and that the liability of the carrier after so transporting them, even without notice to the consignee of the arrival of the goods, is that of a warehouseman only.<sup>2</sup> In New York the contrary rule is established. There the carrier is

2. 2 Hutch. on Carriers, §§702 and 711. 2 Hutch. on Carriers, §708. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Tex. 1915) 178, S. W., 810, 814.

It is presumed that the consignee will know of the time of the arrival of goods in the ordinary course, and it is not necessary, unless made so by contract, in order to change the carrier's relation to the goods to warehouseman to notify the consignee, unless there has been an unusual delay in shipment; but where there was an unusual delay and no notice was given to the consignee the railroad was liable to the consignor as carrier, and the provision in the bill of lading for a return of the shipment in ten days if not accepted, required notice to the consignee and in absence of notice the railroad was liable for their loss by fire. *Danciger Bros. v. Chicago R. I. & P. Ry. Co.* (Mo. 1916) 182 S. W. 120, 121.

On the performance of his contract of carriage in any case, his high obligation as carrier, making him practically an insurer of the property entrusted to him, ceases; but if, for any reason, the owner therefore does not receive it at the place of destination, the carrier is under the milder duty of exercising ordinary care for its safety, until it is called for, redelivered, or disposed of in some legal way. He can neither abandon it nor leave

it exposed to known danger of loss, destruction, or injury. *Brown Shore Co. v. Hardin* (W. Va. 1916) 87 S. E. 1014.

Where a carrier on being notified of the refusal of the original consignee to pay for the goods informed the consignor, after investigation, that it located the goods and indorsed on the original bill of lading a statement that they were reconsigned to another, a new contract of shipment was entered into which was binding on the carrier, even though not consented to by the original consignee, and the carrier was liable to the second consignee for failure to deliver the goods. *A. E. Myers & Co. v. Norfolk Southern R. Co.* (N. C. 1916) 88 S. E. 149, 150.

The notice which a carrier is required to give to the consignor of goods which have been taken from its possession by process of law is to enable the consignor to protect his interest, and was satisfied by a notice given shortly after the property was taken, when, under the circumstances, no notice could possibly have given the consignor an opportunity to protect himself. *Danciger v. Atchison T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800.

Where goods were consigned to the shipper at the residence of the purchaser by bill of lading with draft attached providing for notice to purchaser, and the purchaser did not accept the goods, there be-

charged with the duty of notifying the consignee of the arrival of the goods. So in Massachusetts it has been stated that it seems too clear for argument that unreasonable failure to deliver, or, in the case of carriage by water, unreasonable failure to notify the consignee of arrival, is a "failure to carry out and perform" the carrier's contract.<sup>3</sup> Furthermore it seems that the notice of arrival should be reasonably specific so as to notify the consignee of what the shipment is. So a receiver of freight engaged in the millinery business may be excused for failure to respond to a notice sent to it by a railroad which specifies that the carrier has on hand a shipment of shoes consigned to such person, although it afterwards appears that such shipment really consisted of velvet, and can recover damages for delay in delivery of the velvet.<sup>4</sup> But it is the duty of consignees at non-agency station, under the provisions of the uniform bill of lading, to look out for the arrival of their freight, and they are not entitled to notice of same.<sup>5</sup> Hence a stipulation which provides that where the packages are consigned to a station where the carrier has no agent, the shipper authorizes and directs the carrier upon arrival of the train, by day or night, and regardless of the weather, to deposit the goods or packages upon the platform whether there be anyone there to receive them or not, "and the shipper agrees that the carrier's liability shall end upon such deposit, and that such deposit shall be considered a delivery to the consignee," does not require notice to be given to the consignee of the arrival of freight nor in any way guarantee that the freight train will move by schedule, or be there at a certain time.<sup>6</sup> But, of course, the shipment must be transported with

ing a local custom that the railroad company should notify the shipper within 48 hours if a car is refused or not accepted upon arrival, its failure to give such notice was a breach of contract, although the purchaser had not notified the railroad that he refused to unload the car. *South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co.* (Mass. 1916) 111 N. E. 367.

3. *Norway Plains Co. v. B. & M. R. R.*, 1 Gray, 263, 61 Am. Dec. 423; *Mansur v. New England Mutual Marine Ins. Co.*, 12 Gray, 520, 526. *Ideal Leather Goods Co. v. Eastern S. S. Corporation*, (Mass. 1915), 107 N. E., 525, 527.

4. *A. E. Wood & Co. v. M. C. R. Co.* (Mich. 1915), 151 N. W., 601.

5. *Morrison Tent & Awning Co. v. I. C. R. R. Co.* (Mo. 1915), 175 S. W., 220, 222.

6. *Morrison Tent & Awning Co.*

reasonable despatch.<sup>6 1/2</sup> In an action for the value of a shipment of onions while in defendant carrier's possession, where there was evidence that the shipment on arrival was never removed to a storage house, and no evidence that the car was ever located on the carrier's unloading track, or at any other convenient place, its liability was not changed from that of a common carrier to a warehouseman.<sup>7</sup>

**Notice to Consignor.** It seems that the weight of authority is to the effect that where the consignee refuses to accept or fails to accept a shipment, the shipper should be notified. But in order to enable a consignor to recover damages for the failure of the carrier to notify it of the refusal of the consignee to accept shipment, it is necessary to show the damages resulting.<sup>8</sup>

In a typical case the purchaser of certain leather goods desired to return them to the seller in order to divest itself of title. The carrier (a vessel) delayed the shipment and did not notify the consignee of the arrival of the goods until three months after the arrival of shipment at destination. The shipper (the purchaser), sued for damages both for conversion and for the damage caused through the negligent delay, as the consignee refused to accept the goods. Damages were recovered before a jury. The consignor, notwithstanding a letter of the consignee written prior to shipment, refusing to receive the goods, had the right, as against the carrier at least, to assume that upon notification of their arrival the consignee might decide to accept them. It owed no duty to the carrier to acquaint it (the carrier) with the contents of the letter; nor, if it had done so, would the legal duty of the carrier have been changed. Moreover, the

v. I. C. R. Co., (Mo. 1915), 175 S. W., 220, 221.

6 1/2. See *infra*, Chapter III, 2.

7. Chicago, R. I. & P. Ry. Co. v. Stouffer, (Ind. 1916), 111 N. E. 809.

8. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y. Supp. 154, 157.

The question presented is very intricate, and one upon which in former years text writers have disagreed, although at the present

time the law seems well settled.

Hutchinson on Carriers, 3rd Edition, page 720, calls attention to the fact that cases have held that if the goods are refused by the consignee, the carrier from that time simply holds them as a warehouseman, and if stored safely its liability is at an end. However, Hutchinson then goes on to say, Section 721:

burden of proof was upon the carrier to show that the non-performance of its undertaking was for a cause which relieved it from liability. And the shipper was entitled to recover dam-

"But the better opinion would seem to be that the carrier would be bound to presume, from such refusal, that the consignor was still the owner of the goods, and that, to relieve himself from his responsibility as carrier, it would be necessary for him to store them, either in his own warehouse or with some responsible warehouseman, and give notice of the fact to such consignor or owner. If, however, the consignee be the owner, the notice of the storing of the goods, if they are not retained by the carrier in his own warehouse, should be given to him, so that he may know where to call for them if he should so wish. Accordingly, where goods were intrusted to an express carrier, with instructions to collect the price of them upon delivery, it was held to be liable for their loss by depreciation in value, the goods having been kept by the carrier at the place of destination, without notice to the consignor, for nearly a month after they had been tendered to the consignee, and not taken by him, because he was not then prepared to pay for them, although he had several times promised to call and pay for them. But the carrier will not be required to give notice to the consignor that the consignee refused to accept the goods where such notice has been given by the consignee."

Moore on Carriers, 2nd Edition,

page 400, states the rule as follows:

"It is quite generally held that when goods sent by a common carrier have arrived at their destination, and have been tendered to and refused by the consignee, the contract for their carriage has been performed, and after the consignee has had a reasonable time to call for and receive them, the carrier becomes merely a warehouseman, and responsible for the care of a warehouseman in protecting the consignor's interest and is not bound as a general rule to notify the consignor of the non-acceptance of the goods by the consignee."

However, Moore does not cite the cases which hold a contrary doctrine; the majority of which are very much more recent than the cases he cites. Moore's statement of the law is erroneous, and does not seem borne out by a review of the cases. The Encyclopedia of Law & Procedure, page 474, lays down the same rule as Moore states, but the American & English Encyclopedia on Law, Second Edition, Volume 5, page 222, states the rule to be the same as laid down in Hutchinson. The very recent cases all take the view that notice must be given to the consignor. Moreover, careful analysis of the cases cited as sustaining the view that notice need not be given to the consignor, show distinguishing facts and circumstances. In *M. C. R. R. v. Harville*, 136 Ill. App. 243.

ages, either nominal or otherwise.<sup>9</sup> And under the Carmack Amendment, the initial carrier is liable, not only for the negligent acts and omissions of its employes, but for those of connecting carriers resulting in any loss or damage to the goods en route,<sup>10</sup> and also for any loss or damage resulting from the failure of the final carrier to notify the consignee of the arrival of the goods at destination, and for its failure, on the consignee's refusing to accept them, to store the goods for the account of the shipper or to exercise prop-

the Court said, p. 253:

"There is no authority which holds that on refusal of freight by a consignee or non-delivery through other obstacles, notice is not required by the consignor or persons known by the carrier to be owners or interested in the goods. The law is the other way."

To the same effect are the following cases:

*Fine v. Barrett*, 142 N. Y. S. 533, 81 Misc. 234.

*Ala. Grt. So. Ry. v. McKenzie*, 77 S. E. 647, 139 Ga. 410.

*N. C. & St. L. Ry. Co. v. Dreyfus-Weil Co.*, 150 Ky. 333.

*Carrizzo v. N. Y. S. & W. Ry. Co.*, 123 N. Y. S. 173.

*Freiberg v. Ry.*, 30 O. Circ. Ct., 669.

*M. C. R. R. v. Harville*, 136 Ill. App. 243.

*M. K. & T. Ry. v. Groce*, 106 S. W. 720.

*L. & N. Ry. v. Duncan & Orr*, 137 Ala. 446.

*American, etc., Express Co. v. Wolf*, 79 Ill. 430.

*American Express Co. v. Wettstein*, 28 Ill. App. 96.

*Block v. U. S. Express Co.*, 68 Atl. 183.

*M. K. & T. Ry. v. Jenkins*, 35

Tex. Civ. App. 429.

*Beedy v. Pacey*, 60 Pac. 56.

*Am. Sugar Ref. Co. v. McGhee*, 96 Ga. 27.

From the foregoing authorities and the citations which they discuss it seems the modern weight of authority is that in case of a refusal of goods by the consignee, the carrier is bound to give notice to the consignor.

9. *Ideal Leather Goods Co. v. Eastern S. S. Corporation*, (Mass. 1915), 107 N. E., 525, 526.

10. *Adams Express Co. v. Croninger*, 226 U. S., 491, 33 Sup. Ct., 148, 57 L. Ed., 314, 44 L. R. A., (N. S.), 257; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S., 639, 33 Sup. Ct., 391, 57 L. Ed., 683; *Galveston, H. & S. Ry. Co. v. Wallace*, 223 U. S., 481, 32 Sup. Ct., 205, 56 L. Ed., 516; *Atlantic Coast Line Ry. v. Riverside Mills*, 219 U. S., 186, 31 Sup. Ct. 164, 55 L. Ed., 167, 31 L. R. A. (N. S.), 7; *Becker v. Pa. Ry. Co.*, 109 App. Div. 230. 96 N. Y. Supp., 1; *Earnest v. D. L. & W. R. Co.*, 149 App. Div. 330, 134 N. Y. Supp., 323; *Coovert v. Spokane, P. & S. Ry. Co.*, 80 Wash. 87, 141 Pac., 324; *Norfolk & W. R. Co. v. Stuart Draft Co.*, 109 Va. 184, 63 S. E., 415. *Wein v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Supp. 154, 156.



er care in holding them for him.<sup>10½</sup> Where perishable goods, in good condition when loaded, were kept in a closed car 14 days after arrival before notice to the shipper, there being a local custom that the shipper should be notified within 48 hours after arrival of a car if delivery could not be made, it was held that the jury could find that the resulting loss was caused by the railroad's negligence;<sup>11</sup> since a local or special custom of a carrier regulating the delivery of goods forms a part of the contract of shipment, unless it is contrary to law or some provision in the contract.<sup>12</sup> But when a shipment arrives on time, and the transit is ended, and the carrier puts the goods in its warehouse to await delivery to the consignee, its liability as carrier ceases, although no notice is given to the consignee, and it is thereafter liable only as a warehouseman; but the liability of a carrier does not cease immediately upon the prompt arrival of goods at its destination, but only after the lapse of a reasonable time for their removal by the consignee, and the time when the liability as carrier ceases may depend upon special contracts or local custom.<sup>13</sup>

3. **Consignee's Right to Inspect.** Although, as will appear, it has been held in the case of order-notify shipments that the consignee has not even the right to inspect a shipment unless the carrier is directed to permit it by the consignor, the same rule apparently does not hold good in case of C. O. D. express shipments. It has recently been held that where an express company received four dresses from a dress maker shipped C. O. D. to a customer with instructions not to deliver until the full amount had been paid, the customer nevertheless had a right to a reasonable opportunity to inspect them before paying for them and the express company is not liable for the value thereof, for allowing such inspection which resulted in the rejection of three of the dresses by the customer.<sup>14</sup> And, in general, the

10½. *American Merchants' Union Exp. Co. v. Wolf*, 79 Ill., 430; *N. C. & St. L. Ry. Co. v. Dreyfuss-Well Co.*, 150 S. W., 321, 150 Ky., 333.

11. *South Deerfield Union S. Co. v. New York, N. H. & H. R. Co.*, (Mass. 1916), 111 N. E. 367, 368.

12. *South Deerfield Union Storage Co. v. New York, N. H. & H. R. Co.*, (Mass. 1916), 111 N. E. 367.

13. *Danciger v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1915), 179 S. W. 800.

14. *Southern Express Company v. Grace*, (Miss. 1915), 68 So. 172

consignee always has the right to inspect a shipment before accepting it, and the carrier is not liable for permitting such inspection. So where a consignee of goods examined them while in the car without permission or knowledge of the railroad company, and it was not shown to have been negligent, the railroad company is not liable for allowing the inspection.<sup>15</sup> Where sellers of hay sent out circulars reciting that they guaranteed their grade and would bill all cars inspection permitted, the railroad company was not liable for allowing inspection of a car sent under a bill of lading prohibiting inspection unless provided by law or permission was indorsed on the bill or given in writing by the shipper.<sup>16</sup> It takes something more than mere delivery of a carload of freight at the unloading place to constitute a delivery of the subject of the transit into possession of the consignee. Reasonable opportunity for determining whether the carrier has performed its contract or not is required. If the property is found upon inspection, with reasonable diligence, to have been rendered worthless, or to have been materially injured while in the possession of the carrier, the consignee is not bound to accept the setting out of the car as a delivery of its burden. The consignee is not obliged to accept regardless of condition. He is entitled to reasonable time and opportunity to inspect the property and to reject it if rendered worthless or materially injured in the transit, or to take it without acceptance as having been transported according to contract.<sup>17</sup>

#### 4. Conversion. Where a railroad fails to deliver property, or

15. *Elm City Lbr. Co. v. Atl. Coast Line R. Co.*, (N. C. 1916), 88 S. E. 139.

16. *Elm City Lbr. Co. v. Atl. Coast Line R. Co.*, (N. C. 1916), 88 S. E. 139.

17. *Hutchinson on Carriers* (3d Ed.) 733; *Elliott on Railroads*, No. 1528. That is elementary. *Berger-Crittendon Co. v. C. M. & St. P. Ry. Co.* (Wis. 1915), 150 N. W., 496, 501.

It is, generally speaking, the duty of the consignee to take delivery of the shipment, even though damaged, and afterwards present a claim against the carrier.

*Moody v. So. Ry. Co.*, 79 S. C. 297; 60 S. E. 711.

*Moore on Carriers*, 2nd. ed., p. 251 et seq.

The reason for the rule is that the consignee cannot by design nor to promote his convenience de-

delivers the property to the wrong consignee, it is liable for conversion. The question as to when conversion arises is very interesting. Sometimes the mere refusal of the carrier to deliver is not a conversion. Thus, where the bill of lading authorized the carrier to leave goods on the platform of a non-agency station and the train was 50 minutes late, the consignee not being there to

prive the carrier of the right to terminate by delivery its liability as insurer within a reasonable time. Where goods are conveyed to the place of destination and the consignee does not accept, or refuses to receive the goods, the carrier may discharge itself from further responsibility, except as warehouseman, by storing the goods in its warehouse, or in that of some responsible third party, and the goods are then subject to its lien for storage as well as transportation charges. After notice is sent to the consignor, or owner, and the goods held in storage for a reasonable length of time, if the consignee still refuses to receive the goods, the lien may be enforced as provided by law, and the carrier will be discharged from further liability upon accounting for the proceeds.

If the goods are of a perishable nature, and it becomes a matter of necessity to sell to prevent a total loss, the carrier may sell them after giving reasonable notice of time and place of sale, and retain its freight and charges from the proceeds. The sale in such case is not in virtue of its lien, but in the interest of the owner. However, in order to relieve itself from liability the carrier must deliver the goods in good condition, and is not justified in abandoning

them or negligently exposing them to injury even if the consignee neglects or refuses to accept or receive them after notice of their arrival. *Moore on Carriers*, 2nd ed., p. 259.

The consignee is not warranted in refusing to receive the goods on account of damage or depreciation in value resulting from delay in delivering, but upon notice of their arrival should receive them and dispose of them to the best advantage, and the measure of damages he is entitled to recover will be the difference between the amount he would have realized if prompt delivery had been made and the amount actually realized. He is entitled to recover only to the extent of the actual injury.

*Mills v. National Steamship Co.*, 5 N. Y. Supp. 258.

*Adams Express Co. v. McDonough*, 6 Ohio Cir. Ct. Rep. 539. *New Orleans, etc., R. Co. v. Tyson*, 46 Miss. 729, 1 Am. Ry. Rep. 474.

*Howe v. Oswego, etc., R. Co.*, 56 Barb. (N. Y.) 121.

*Nettles v. South Carolina R. Co.*, 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

The receipt of goods damaged, but yet of some value will not be regarded as a waiver of claim for damages, and failure to receive such goods within a reasonable

receive the freight, and the carrier thereupon placed it in a warehouse, the key to which was left at a neighboring residence, it was not liable for conversion.<sup>18</sup> And a delivery by a carrier upon the order of the consignee to a third person is a complete bar to an action by the shipper for misdelivery.<sup>19</sup> However, where the agents of an initial and connecting carrier change-

time will entitle the carrier to offset a claim for storage against the consignee's claim for damage.

Gulf, etc., R. Co. v. Boston, 4 Tex. Civ. App. Cas., sec. 66.

Galveston, etc., R. Co. v. Van Winkle, 3 Tex. Civ. App. Cas., sec. 442.

So, if the goods are so damaged as to be unsafe for removal from the station, and the carrier fail to repair, if they are capable of repair, acceptance cannot be required of the consignee. Moore on Carriers, 2nd ed., p. 261.

So, shortage of goods does not justify a refusal to accept, and if they are sold for freight and storage charges the consignee has no right of action. Moore on Carriers, 2nd ed., p. 261.

The consignee is not bound to accept, however, where only one-third of the goods are tendered, and there is no evidence that they are the original goods shipped.

Chicago, etc., R. Co. v. Warren, 16 Ill. 502.

Hutchinson on Carriers, 3rd ed., section 1365, well states the rule as follows:

"As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss and sue for their value does not apply to contracts of affreightment. The fact, therefore, that the goods are

injured upon the journey, through causes for which the carrier is, responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury. Where, however, the damage is such that the entire value of the goods is destroyed the consignee may refuse to receive them and sue the carrier for their value. Thus where a patented machine, while being transported from the manufacturers, was so injured as to be practically worthless and to cost as much to repair it as to buy a new one, it was held that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for carriage with interest from the time when it should have been allowed. But where one of a number of boxes shipped was missing, it was held that the consignee was not justified in refusing to receive the balance, but was bound to accept them and hold the carrier for the missing portion."

18. Morrison Tent & Awning Co. v. I. C. R. R. Co., (Mo. 1915), 175 S. W., 220, 222.

19. Mutual Lumber Co. v. Southern Ry. Co., (S. C. 1915), 84 S. E. 994, 995.

ed the bill of lading on a shipment of horses from the order of the shipper, notify a bank, to a straight shipment to the bank, without the consent of anyone except the caretaker, who had no authority, there was a joint conversion and both carriers are liable to the shipper for the value of the shipment. The measure of damages in this form of action against the carrier—that is, as for conversion—is the value of the goods at the place of destination, less the cost of transportation, and with interest thereon under the state statute, (if so provided), if the jury sees fit to give it.<sup>20</sup> In case of conversion the tort involved in the conversion operates to dispel the beneficial provisions of the contract of shipment vouchsafing special privileges and rights to the tortfeasor and remits the matter to be reckoned with on the obligation of an insurer. Because of the tort the law immediately creates a new relation between the parties independent of the contract, in that the carrier is deemed to have abandoned the contract of shipment. In this view it is therefore said he may not thereafter insist upon a stipulation that his liability shall be limited to a certain sum. But there is doubt whether in case of a conversion a released rate would not be binding. As a matter of fact, there should be no reason for holding the carrier liable for greater damages for conversion in case of goods shipped under limited liability than in any other kind of case. Moreover, a shipment under a released rate is really one under a special contract authorized by law, and, under the Interstate Commerce Act, to permit a greater recovery than the value on which the rate is based, would seem an unauthorized departure from the published tariff.<sup>21</sup> It has also been held where the carrier is guilty of a conversion of the goods he cannot escape liability on the ground that the owner failed to present a notice of his claim according to the terms of the shipping contract.<sup>22</sup> So also it has been held, the delivery of goods by a railway company, at a station and to a

20. 3 Hutchinson on Carriers Co. (Missouri 1915), 178 S. W., 292, (3rd Ed.), p. 1640. 295.

21. 1 Hutchinson on Carriers A carrier converting goods shipped under a contract limiting liability to a specified sum at which the goods are valued is, notwithstanding the contract, liable for the (3d Ed.), 432 et seq.

22. 1 Hutchinson on carriers the goods are valued is, notwithstanding the contract, liable for the (3d Ed.), 445. People's State Savings Bank v. Missouri, K. & T. Ry.

person to whom the same were not consigned, constituted a conversion, and made the company liable for the full value of the goods, although the contract of shipment fixed upon the goods a valuation less than their real value in consideration of the rate of freight being reduced, there being nothing in the terms of the contract which would relieve the carrier from damages occasioned by its own negligence in making a wrong delivery.<sup>23</sup> And where a carrier is guilty of a conversion arising from its refusal to deliver a shipment upon payment of the proper transportation charges until a claim it has against the owner is satisfied, punitive damages are recoverable.<sup>24</sup> An express company receiving shipments of intoxicating

full value of the goods. *St. Louis, I. M. & S. Ry. Co. v. Wallace*, (Tex. 1915) 176 S. W. 764.

Where a carrier transported freight to a wrong place, and there sold it as unclaimed freight, it converted it and was liable for its full value, though the contract of shipment fixed a less sum as value, and though a carrier merely losing freight may rely on the limited liability. *St. Louis I. M. & S. Ry. Co. v. Wallace* (Tex. 1915) 176 S. W. 764.

The delivery of goods by a railway company, at a station and to a person to whom the same were not consigned, constituted a conversion, and made the company liable for the full value of the goods. Although it (the contract of shipment) fixes upon the goods a valuation less than their real value, which stipulation the shipper agreed to in consideration of the rate of freight being reduced, there is nothing in its terms which would relieve the carrier from damages occasioned by its own negligence in making a wrong delivery. *St. Louis I. M. & S. Ry. Co. v. Wal-*

*lace* (Tex. 1915) 176 S. W. 764, 765.

There is a sound public policy, in preventing a common carrier, who has not shipped under the contract, from maintaining a defense of a lesser agreed value for goods, and in allowing the shipper to recover a greater market value, after the carrier has been guilty of converting the goods. The consequence of such a doctrine, if permitted, can be readily discerned; and though the contract, with the agreed valuation, calls for an interstate shipment, the federal Supreme Court has not held, nor tended to hold, the contract applies to conversion. *St. Louis, I. M. & S. Ry. Co. v. Wallace*, (Tex. 1915) 176 S. W. 764, 766.

It has been said in an action of trover and conversion, good faith cannot be shown as a defense, but only where exemplary damages are claimed, in mitigation thereof. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1916) 183 S. W. 98, 99.

23. *St. L. I. M. & S. Ry. v. Wallace*, (Tex. 1915), 176 S. W., 764, 765.

24. *Southern Express Co. v. Rea-*

liquors to consignees in another state, and which refused to deliver them there because of its laws regulating the delivery of intoxicating liquors, was bound to return the packages to the shipper, and its failure to do so was a breach of contract, giving the shipper the right to sue for a conversion.<sup>25</sup> But a mere delay in transportation is not a conversion.<sup>26</sup>

**5. Concealed Loss.** A very aggravating class of claims are what is known as "concealed loss." These are claims for injuries not discovered until the shipment has passed out of the custody of the carrier. Thus, a case of crayons is shipped from Pittsburg to San Francisco by way of New York. After arrival the consignee places the shipment in a warehouse. Several days later the shipment is opened and the crayons are broken. If claim is made against the initial carrier it will claim either the steamer or the truckman was guilty of the injury. But claims of this kind, if supported by proper legal proof, are just as valid as any other kind. The principal point to investigate is the treatment accorded the shipment while transporting it from the delivering carrier to the warehouse. If witnesses can testify the shipment was carefully unloaded from the car, carefully loaded into the truck, carefully unloaded into the warehouse, and that it experienced no rough handling en route, the claimant has made out a case which should entitle him to recover against the carrier.

gin, 228 Fed. 14.

**25. Danciger v. American Express Co.,** (Mo. 1915), 179 S. W. 806.

In an action against a carrier for the conversion of freight, the testimony of the freight claim agent of the carrier as to his efforts in tracing the freight was admissible, and he could, when having personal knowledge of the facts, testify as to the remittance to the treasurer of the carrier of the net proceeds of the freight sold as unclaimed freight. *St. Louis, I. M. & S. Ry. Co. v. Wallace* (Tex. 1915) 176 S. W., 764, 765.

**26.** It is well settled that mere delay in delivery of goods does not constitute a conversion. Negligent delay will not render a carrier responsible for conversion, but only for such damages as are the proximate result of the delay.

*Hutchinson on Carriers*, 3d Ed. Sections 651, 1372.

If the shipment arrived within a reasonable time, and the consignee was notified and neglected to receive the goods, the carrier is not liable.

*Hutchinson on Carriers*, 3d. Ed. Sec. 713.

This may be further strengthened by the fact that other shipments of a similar character were uninjured under like conditions, altho the admissibility of such evidence is dubious in certain jurisdictions. So, in an action to recover the value of good claimed to have been lost in transit, before the claimant is entitled to recover, it is incumbent upon him to prove that the loss in question occurred while the goods were in the carrier's possession. Generally the missing link in the proof is the care taken of the shipment from the time of its delivery by the carrier to the truckman sent to take the shipment from its possession, to the time when he made delivery thereof to the claimant. To make out a complete case there should be proof that the goods were not lost or stolen while in the possession of the truckman.<sup>27</sup>

**6. Dispute Over Charges.** While cases of this kind are somewhat rare, yet claims often arise through the action of the carrier in demanding excessive charges or unlawful charges. Naturally consignees are in a position where a peculiar force can be brought upon them, if a dispute over charges arise and a shipment remains on the side-track with demurrage accruing. The consignee may have resold the shipment, or needed it for business purposes and suffered an injury proportionate to the duration of the argument. If the carrier is right in the dispute then the consignee is without any remedy. On account of the superior facilities of the carrier to ascertain the lawful charges it would seem only reasonable to require the consignee to pay the charges under protest, and if unlawful he would then have an ample remedy against the carrier. Of course, some consignees may not wish to do this, but they always run the risk of being without any means of recovering the loss in the event the carrier is shown to be right. In a typical case it was held, if a railroad company was entitled to charge the amount of freight demanded, it had the right to hold the shipment until it was paid, and the damage occurring while it was being so held was damages accruing or arising out of the shipment covered by the

27. *Canfield v. B. & O. R. R.*, 75 N. Y. 144; *Hirsch v. Hudson R. R.*, 83 Misc. Rep. 88, 144 N. Y. Supp. 682; *Silverman v. Cleveland, Line*, 26 Misc. Rep. 823, 57 N. Y. C. C. & St. L. Ry., 157 N. Y. S. Supp. 272; *Baer v. N. Y. C. & H.*, 876, 877.



contract made, and if it demanded freight it was not entitled to receive, and wrongfully held the shipment to compel the payment thereof, it was still liable for such refusal to deliver as a common carrier,<sup>28</sup> and answerable therefor only in accordance with

28. *Kansas City Southern Ry. Co. v. Bull*, (Ark. 1915), 179 S. W. 172, 174.

An express company refusing to deliver property to the consignee, upon his payment of its charges, was guilty of a conversion. *Southern Express Co. v. Reagin*, 228 Fed. 14.

A carrier must deliver up a shipment upon receiving proper transportation charges. It can not hold the shipment until a claim growing out of a different matter entirely is satisfied by the owner. *Southern Express Co. v. Reagin*, 228 Fed. 14.

The refusal of a shipper to pay more than the contract rate for freight, which was less than the proper rate, does not affect his right to recover for conversion, where the carrier would not accept the proper rate, but sold the goods for its charges. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1915) 183 S. W. 98.

An action against a carrier for damages on the demand of an excessive freight charge, which the shipper refused to pay, and the sale of the goods for the charges is one for conversion. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1916) 183 S. W. 98.

That the agent of a carrier demanded only a small amount in excess of the legal rate, and the demand was honestly made without wrongful intent, does not affect

the shipper's right of recovery for conversion by the sale of the goods on refusal of the shipper to pay the charge; "conversion" being any distinct act or dominion wrongfully exerted over another's property in denial of his right or inconsistent with it. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1916) 183 S. W. 98, 99.

In an action for conversion by a carrier on refusal of the shipper to pay an excessive freight rate, the award of the Interstate Commerce Commission, determining the proper rate for the shipment, was admissible in evidence. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1916) 183 S. W. 98, 99.

Sec. 3 of the Interstate Commerce Act, provides as follows *inter alia*:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities

the stipulation in the contract of carriage limiting the time in

ties to another carrier engaged in like business."

This section, it will be noted, imposes upon the carriers the obligation of promptly carrying the commerce of the country over connecting lines of roads, subject, of course, to such reasonable regulations as may be formulated by them and carried in lawful tariff authority.

It has been well stated by the Interstate Commerce Commission that so long as a connecting carrier holds itself out as a common carrier and through carriers make joint rates with it, innocent third parties have a right to assume that the road is what it purports to be and the published tariff was lawful. An innocent third party is not concerned as to the legality of the published charge or the legality of the common carrier.

Crescent Coal & Mining Co. v. C. & E. I. R. R. Co. 24 I. C. C., 149, 156.

Furthermore, the lines of interstate carriers are public highways the use of which cannot be restricted by railroad companies in their own interest regardless of the rights of shippers.

Memphis Hay & Grain Asso. v. St. L. & S. F. R. R. Co. 24 I. C. C., 609, 615.

In *Quannah A. & P. R. R. Co.* (Tex. 1915), 178 S. W. 858, an initial carrier held a shipment of roofing in transit for failure of delivering carrier to pay charges. While shipment was held at the junction point the consignee notified the initial carrier

that the roofing was needed to cover certain lumber, and that it should be covered for protection from the elements. The initial carrier refused to deliver the shipment to the delivering carrier for several days, during which period rain fell which damaged the lumber. It was held that an initial carrier had no right to hold thru freight until the connecting carrier paid its charges, especially where it had the right to demand prepayment of charges and did not do so, as the interest of the public requires common carriers to settle their disputes either by agreement in the courts or before the railway commission. Shippers should not be subjected to delay and damage caused by these disputes. Also see:

*Railway Co. v. Lone Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W., 622.

*Railway Co. v. Lone Star Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

*Railroad Rate Regulation*, (2nd ed.), Beal & Wyman, Sec. 866 et seq.

*Palmer v. C. B. & Q. Railroad Co.* 56 Conn. 137.

The Uniform Bill of Lading itself contemplates that shipments destined to prepay stations shall be delivered. Sec. 5 provides inter alia:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until

which suits should be brought for damages arising out of the shipment to six months after the damage occurred, or the cause of action accrued.<sup>29</sup> And where a railroad company wrongfully caused a delay at destination owing to its demand for excessive charges by reason of which demurrage accrued, and the shipment had to be reconsigned to another market in order to save loss, the railroad is liable for the demurrage charges and the freight rate from destination to the market where eventually sold.<sup>30</sup> However, by statute in some states the carrier cannot compel the consignee to prepay the charges before delivery. Thus in Georgia under the ruling in *Florida & Alabama R. Co. v. Elliott*, 3 Ga. App. 773 (2), 60 S. E. 363, the consignee is not required to tender the amount due the carrier for freight charges

loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

Sec. 8 provides:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

There is no provision in the bill of lading or in the tariff which gives to the carrier the right to hold through shipments at a junction point until the charges are prepaid. The carrier might conceivably justify the contention that the shipper would assume at the junction point at a tariff time, required of him to be there present to take the shipment out to sea.

charges. Or conceivably the initial carrier might insist upon prepayment of the charges when destined to a nonagency station.

The connecting carrier has not the right to hold shipments in this manner. The Interstate Commerce Commission has inferentially held to this effect.

*Tloga Coal Co. v. C. R. I. & P. Ry. Co.* 18 I. C. C. 414, 415.

*Munroe & Sons v. M. C. R. R. Co.* 17 I. C. C. 27, 28.

Of course, since the Interstate Commerce Act is expressly applicable to connecting carriers, a different question would arise had the connecting carrier filed a tariff expressly providing that it would have the right to hold a shipment consigned to a non-agency point on its line for prepayment of charges. A carrier is certainly liable for an unreasonable delay in delivery.

29. *Kansas City Southern Ry. Co. v. Smith*, (Ark 1915), 179 N. W. 212, 178.

30. *W. & A. M. & N. Ry. Co. v. Adams*, (Ark 1915), 179 S. W. 215, 212.

in advance of a demand that a "solid" car be so placed as to make its unloading practicable; and under the ruling in *Southern Express Company v. Briggs*, 1 Ga. App. 294 (4), 57 S. E. 1066, a failure to deliver a shipment, or the postponement of delivery of such shipment until the necessity for its use has passed, will support an action for the conversion of the property, and a recovery of the value of the property thus held by the carrier as damages.<sup>31</sup> And a railroad company is liable for conversion where it attempts to exact the highest of two conflicting rates on shipments of onions and upon payment being refused, sends a corrected bill on the lowest of such rates, and then sells the onions as perishable freight within two days thereafter.<sup>32</sup>

**7. Fire.** Not only may there be an injury by fire to a shipment awaiting transportation, but frequently there is such an injury while the shipment is on the side-track at destination. In a case of this kind the right of recovery is determined by whether there has been a delivery to the consignee or not. So where a railroad has transported a car of freight to the point designated by the shipper, has notified the consignee of the arrival of the car, and given permission to unload the same, and the consignee has broken the seal thereon, and locked the door with its own lock, and retained the key, and later a fire occurs in the car, and the goods therein are thereby destroyed, the railroad company is not liable.<sup>33</sup> A railroad whose relation to goods at the time of their destruction by fire is that of a carrier, is liable as an insurer to safely carry and deliver;<sup>34</sup> but if its relation to goods at the time of their destruction by fire is that of warehouseman, it is only liable for negligence.<sup>35</sup>

**8. Misdelivery.** It is the duty of the carrier not only to deliver the property to the correct person, but also to deliver it at the correct place. Of course, the measure of damages in each case may be somewhat different. Thus, where the delivery is made

31. *Southern Ry. Co. v. Morgan*, (Georgia 1915), 85 S. E. 933.

32. *Dreyfus v. Penn. R. Co.*, 153 N. Y. S. 966, 969.

33. *McIntire v. C. R. I. & P. Ry. Co.*, (Nebr. 1915), 152 N. W., 305.

34. *Danciger Bros. v. Chicago, R. I. & P. Ry. Co.*, (Mo. 1916), 182 S. W. 120.

35. *Danciger Bros. v. Chicago, R. I. & P. Ry. Co.*, (Mo. 1916), 182 S. W. 120.

to the wrong person the carrier is liable for the full value of the shipment. Where the delivery is made at the wrong part of the plant, or on the wrong side of the street, then the carrier is only liable for drayage charges to the correct place. The question of correct delivery arises quite frequently. The question is of a great deal of importance to great industrial establishments where there are thousands of carload shipments every year. In these instances it has become a part of the efficiency plan that cars be loaded and unloaded at certain points. Since at common law it was not the duty of carriers to spot cars, in some instances contracts were made with the carriers to perform this service. The passage of the Interstate Commerce Act nullified all contracts of this kind so far as they applied to interstate shipments. A typical case is as follows: In 1887, the General Electric Company moved its plant to the city of Schenectady and acquired 11 acres of land and two buildings. These premises were adjacent to the Delaware & Hudson Company's railroad tracks, which company operated a siding about 1,500 feet in length into this property, and for a considerable time by use of its own motive power placed cars for the General Electric in positions to be conveniently loaded or unloaded; this process being known as "spotting." The New York Central had no access to the premises at the time, and incoming and outgoing freight on its lines was spotted by the Delaware & Hudson Company's locomotives for which the latter company made a uniform charge of \$1 per car; this charge being absorbed by the New York Central as part of its transportation—that is, the New York Central made a flat rate to Schenectady, and it recognized that a part of its duty in transporting freight to and from Schenectady was the spotting of cars upon the premises of the shipper. It was never suggested that its duty was completed by merely running these freight cars off from its right of way and placing them upon the siding within the plant; it recognized that its obligation ended only with the spotting of cars—the placing of them at convenient points for loading and unloading. Not having the facilities for performing this duty of transportation, it entered into a contract with the Delaware & Hudson to complete the work, making no extra charge to the shipper. This arrangement, by which the General Electric afforded yard fa-

cilities, in a measure for its own convenience, and the New York Central furnished the means of properly spotting the cars upon the premises, was the usual and customary method of handling business at Schenectady, except that in cases where the General Electric's own lines reached a siding upon private property, it performed the service of spotting cars with its own motive power, instead of employing the Delaware & Hudson. With the growth and development of the plant, the premises were increased from time to time, until there were about 150 acres within the fences, with something like 12 miles of standard track, interlaced with narrow-gauge tracks, for the purpose of moving heavy freight from building to building within the plant. With this enlargement of the territory covered by the plant came a siding connecting the New York Central railroad lines with the shipper's tracks within the plant, and the movement of freight aggregated about 100 cars each way per day. The General Electric furnished the yard facilities for the handling of this vast quantity of freight. In addition to this, it had from time to time put on new locomotives, until six locomotives were in constant use in spotting freight and in doing the interplant work of the company. These locomotives were purchased and put into use under the provisions of a contract between the New York Central and General Electric, by which the former undertook to place its cars upon the latter's tracks within the yards, and the General Electric, for a consideration of 20 cents per ton, was to separate the cars and spot them for loading and unloading, as had previously been done by the Delaware & Hudson. In an action by the carrier for undercharges, the shipper counter-claimed its charges as agreed for spotting the cars. The carrier contended it had performed its contract of transportation in delivering these 100 cars incoming upon the siding within the shipper's plant, and taking the same number of cars from such siding, and placing them in trains upon its own right of way; that is, while it spotted cars for other persons and corporations owning sidings within their own plants in the city of Schenectady, that in reference to the General Electric it had performed its duty when it had gathered into trains and had deposited upon the interchange siding the aggregate number of cars incoming, and had taken from such siding the loaded or empty cars outgoing. It

was held that since a train of 50 cars required nearly half a mile of track for its accommodation, to suggest that this bunching of a train of cars upon a particular side track completed delivery of this freight, in a community where the carrier was in the habit of spotting cars for its other customers was little less than absurd. Except for the contract, it would be the duty of the carrier to place each car load of freight in a position where it could be conveniently unloaded. It would owe this duty to an incidental consignee, and it would be called upon to place the car upon its own tracks at a convenient point for this purpose, and to afford a reasonable opportunity for unloading. The duty could not be performed by placing a half mile of cars upon a siding, and compelling the consignee to draw the goods the whole length of the train, where it was reasonably convenient to place the car within a short distance of the actual place of final delivery. The General Electric, by providing its own tracks upon its own ground, does not forfeit the rights of the incidental shipper. It still has a right to have the cars placed where they can be loaded and unloaded conveniently. Anything less than this is a discrimination against it. The contract by which the carrier undertook to pay to the shipper the cost of spotting cars is in no sense a rebate; it is merely contracting to perform that portion of the transportation which is involved in placing the cars conveniently for loading and unloading as is done with every shipper in that particular locality and is merely a continuation, under another form, of the original arrangement by which the Delaware & Hudson Company had performed a like service for the shipper. Where a contract grows naturally out of a course of dealing long continued, and not within any of the mischiefs which a statute aims to obviate, it is entitled to great consideration in arriving at the proper construction to be placed upon the particular instrument, and the burden of showing that such contract is in violation of the statute, or constitutes an undue preference, is upon the party asserting the proposition.<sup>36</sup> There could be no question in the first instance that the New York Central had a right to contract with the Delaware & Hudson

36. *Interstate Commerce Commission v. B. & O. Ry. Co.*, 43 Fed. 37. (CC).

for placing freight upon the shipper's premises and spotting the cars as a part of its duty of transportation, so long as like service was performed for all other shippers similarly situated. When the plant developed, and the New York Central could reach the premises over its own tracks, it still had a right to perform the service of spotting the cars; it was its duty to do this, both for the General Electric and all other shippers, and the service which it was bound to afford as a common carrier it could hire the shipper to perform, so long as this contract did not afford the cover for a mere rebate. Good faith is essential to all contracts; but when this is not brought into question, and the parties have entered into an agreement, it is not the province of the courts, by strained construction, to render the contract void. There is no question here that the service performed by the shipper in spotting the cars is not worth the agreed price, or that it is entered into with any purpose of bringing about an undue preference; but the carrier stands upon the bald proposition that the contract is in violation of the provisions of the statute to regulate commerce, and refuses performance of its obligations solely upon this ground. This is error; the effect of this determination, if permitted to stand, would be to deny to the General Electric the same quality of service which is rendered to others in the same locality at the same price. Entirely apart from the contract under consideration it would be the duty of the carrier to deliver each of the 100 cars daily arriving to the shipper in a position where they could be conveniently unloaded. As a common carrier it would be bound to supply sufficient tracks, sidings, and facilities for handling the volume of business necessary to the General Electric's business and, this duty could not be performed by merely placing a string of 50 or 100 cars upon a siding. It would be bound to place each car at a convenient point for unloading, and probably to furnish the necessary cranes, etc., for the work, or at least to provide the necessary space for the use of such appliances as were required in the handling of the class of freight involved. The carrier could not close its eyes to the necessities of the situation; it would be bound, not only to provide for the handling of the cars on one day, but upon all days and to this end it would have to make provision for prompt discharge of the freight. It would



be obliged to afford the facilities for such work, or fail in the discharge of the duties of a common carrier. But it happens that the large volume of business transacted by the General Electric warrants it in relieving the New York Central of a portion of this burden. It finds that by providing its own tracks and locomotives it not only makes room for the handling of the freight, but it facilitates its own business by being able to handle the cars at will, instead of being obliged to await the operations of the carrier's locomotives in placing cars for all its patrons on an equal basis. This does not relieve the carrier, however, from the duty of affording equal facilities, so far as practicable, to the General Electric; it does not change the rules determining what constitutes transportation, and it may be laid down broadly that transportation by railroad of car load lots, under present-day conditions, requires the convenient placing of the car for loading, and an equally convenient placing of the car for unloading, and that the mere question of whether the tracks are upon the property of the shipper or upon the right of way of the transportation company is of no consequence upon this point.<sup>37</sup> As a general thing it may be stated it is primarily the duty of the transportation company to afford sidings and the convenient place of loading or unloading and the proper placing of the cars. If the shipper furnishes the sidings, it does not relieve the transportation corporation of the duty of conveniently placing the cars, and the mere fact that the physical conditions are such that the transportation company is not able to use the shipper's sidings for the accommodation of other shippers does not change the relations. The facilities furnished by the shipper relieve the demand upon the other resources of the transportation corporation, and thus indirectly contribute to the general efficiency of the transportation service, so that there is little force in the attempted distinction between shippers and those who furnish their own switching service. The more conveniently and rapidly the freight is handled, the better for all concerned; and if a shipper, by receiving its cars at a given point and taking them entirely out of the general traffic, can thus relieve the carrier of

37. N. Y. C. & H. R. R. Co. v. 480, 481, 482-9.  
General Elec. Co., 153 N. Y. S. 479,

the necessity of handling it in connection with the consignments to other shippers, there can be no reasonable question that it is contributing to the general efficiency of the service and to the facilities of transportation, without working any inequality to any one.<sup>38</sup>

Very often shipping instructions are vague so that it is difficult for the carrier to tell just where the property is to be delivered. So, where goods are consigned to the consignee at "Grand Street," it is a question for the jury to say whether such words indicate the residence of the consignee or a terminal station to which the goods were to be delivered.<sup>39</sup> And where goods are consigned to a consignee at "Grand Street" which meant the Grand Street Station, and the carrier delivered them to another station, but subsequently promised to transship them and deliver at the Grand Street Station, which was ultimately done, its conduct is an admission of its own default.<sup>40</sup> A carrier

38. *N. Y. C. & H. R. R. Co. v. General Elec. Co.*, 153 N. Y. S. 478, 482.

39. *Loomis v. N. Y. C. & H. R. R. Co.*, (N. Y. 1915), 108 N. E., 837, 839.

40. *Loomis v. N. Y. C. & H. R. R. Co.*, (N. Y. 1915), 108 N. E. 837, 839.

Where it was the practice of a railroad company to deliver goods only to those teamsters of a transfer company who had a freight sheet signed by certain officers of the transfer company, whose signatures were kept by the railroad company for comparison, the railroad company was not liable for goods delivered to a teamster who converted them, where he was in fact authorized to receive them, though his freight sheet was not properly signed. *Parker-Gordon Cigar Co. v. Chicago R. I. & P. Ry. Co.* (Mo. 1915) 179, S. W. 785.

A shipper delivered to defendant railway company two shipments of merchandise consigned to C., a station on the line of a connecting carrier, for which only prepaid shipments were received. The freight was prepaid on one of the shipments, but not on the other, the carrier's agent having failed to inform shipper of the fact that it was a "prepay station," and to require prepayment of the charges. The connecting carrier carried both shipments to the next station beyond C., and the consignees refused to accept delivery at that station. One of the shipments was returned to the shipper on payment of freight charges, but part of the contents of the shipment had been purloined and the remainder had greatly depreciated in market value. The other shipment was not delivered to the shipper because it refused to pay storage charges.

is only authorized to deliver goods upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril, and renders it liable to the holder of the genuine bill.<sup>41</sup> Since the bill of lading is symbolic of the property, it is of considerable importance to ascertain how it may be transferred. There are three different aspects in which a transference of a bill of lading may be considered: 1. As evidence of an intended sale, pledge, or mortgage of the chattels described in the bill of lading, the same as a separate document would be evidence. 2. As an assignment of the shipper's rights against the carrier. 3. As a symbolic delivery of the chattels, equivalent in law to manual delivery. It would seem that there could be no doubt that all these elements characterize the transference of an "order" bill of lading.<sup>42</sup> A "straight" bill of lading is not a true document of title, possession of which is symbolic of actual possession, and that the carrier's possession, though not for all purposes the actual possession of the consignee, nevertheless is on his behalf. If the consignor be in truth the owner and the consignee merely his factor, the consignor may transfer his interest as owner to a third person. But for that purpose his assignment on and delivery of the bill of lading are of no greater force than would be a separate bill of sale while the chattels were in the actual possession of the carrier for the factor consignee. For, "strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods."<sup>43</sup> In other words, though the owner consignor may deal with his interest as owner by separate docu-

without the payment of which delivery was refused, and the shipper claimed the full market value of that shipment. Held, that the loss in both instances was caused by the fault of one or both carriers, and the initial carrier was liable to the shipper therefor, as its contract with the shipper required it and its connecting carrier to deliver the shipments at their destination, and they had no right to demand that the

consignees accept delivery at another station. *J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.* (Mo. 1916) 182 S. W. 131.

41. *Louisville & N. R. Co. v. McKay & Morgan*, (Tenn. 1916), 182 S. W. 585.

42. *E. White & Co. v. Century-S. Bank of Des Moines, Ia.*, 229 Fed. 975, 977.

43. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445, 7 L. Ed. 189.

ments (and they are separate even if written upon the bill of lading), he is powerless to disturb the effect of the "straight" bill of lading as against the carrier or the factor consignee without notice. And this is just, because the owner is the one who creates the bill and selects its form. Necessarily the transferee of such a bill is bound to take notice of its form and acquires no greater rights than the transferor had.<sup>44</sup> Where a shipper consigned lumber to its own order, which was misdelivered by the carrier to the consignee without surrender of the bill of lading, and where such shipper did not immediately learn of the misdelivery, and spent a considerable time in fruitless negotiations with the consignee, the fact that after such shipper learned the truth, and that the consignee had used some of the lumber, it sold the remainder to another purchaser and refused thereafter to accept the consignee's offer to take the lumber and pay the full price, was no ground for the carrier, when sued for the misdelivery, to claim that the shipper had not sought to reduce its damages by accepting the consignee's offer to take the lumber, since after breach of the original contract of purchase by the consignee the shipper was not required to break its new contract to accept the consignee's new offer to take the lumber.<sup>45</sup> Where goods are delivered by a steamship company in accordance with the shipping directions of a straight bill of lading issued by the company and stating the contract between it and the shipper, the latter cannot maintain an action for misdelivery.<sup>46</sup> But where a carrier through mistake or fraud has been induced to deliver goods to the wrong person, it may maintain an action against such person for damages.<sup>47</sup> The duty of an express company in respect to delivery of consignments differs from that resting on railway carriers, in that its duty of delivery does not terminate on the arrival of the goods at the station of destination, but it is required to deliver the goods to the consignee in

44. *C. E. White & Co. v. Century S. Bank of Des Moines, Ia.*, 229 Fed. 975, 978.

45. *St. Louis, I. M. & S. Ry. Co. v. Blisscook Oak Co.*, (Ark. 1915), 176 S. W. 325.

46. *Porter v. Oceanic S. S. Co. of Savannah*, (Mass. 1916), 111 N. E. 864.

47. *Louisville & N. R. Co. v. McKay & Morgan*, (Tenn. 1916), 182 S. W. 585.

person or to his authorized agent at his place of business or residence.<sup>48</sup> Upon the shipper's mistake in the address of a parcel, an express company was not liable if it went to the wrong place; but if its own agent made such mistake it would be bound to deliver it to the proper place, without charge from the place to which it had been sent, or to return it to the shipper.<sup>49</sup> It has been held that since bills of lading are symbols of property, when properly indorsed and delivered to a bank with drafts for the purchase price of merchandise attached, and the bank pays the amount of the drafts to the drawer, it is entitled to the possession of the merchandise until the drafts are paid in full.<sup>50</sup> In another typical case, in the purchase of a car of wheat by a grain dealer, a bill of lading with a draft attached was forwarded to a bank and was paid and taken up by the dealer. The grain dealer then sold the car of wheat and induced the railway company to issue an exchange bill of lading showing a much larger quantity of wheat than was in the car or shown by the original bill of lading, and to the exchange bill of lading a draft was attached which covered the excess. The agent of the railway company had the original bill of lading before him when the exchange bill of lading was issued, and the grain dealer also knew of the excess and collected for it from the purchaser. When the false bill of lading with the draft attached was presented to the party to which the wheat was sold, it paid the draft and took up the bill of lading. Later the car arrived, and, although the purchaser had then learned of the shortage of grain in the car, it paid the freight on the car and accepted and used so much of the wheat as was in the car, and then sued the railway company, which issued the false bill of lading, and the grain dealer, which procured it to be issued, to recover for the shortage of wheat and also for the freight which plaintiff had been required to pay to obtain the wheat actually shipped. Held, that the purchaser was entitled to recover from the railway company and also from the grain dealer for the loss resulting from the issuance of the false bill of lading, which included not only the shortage of wheat

48. *Southern Express Co. v. Potter Bros.*, (Tenn. 1916), 183 S. W. 157.

49. *Southern Express Co. v. Reagin*, 228 Fed. 14, 15.

50. *Huffman v. Henry Motor Co.* (Nebr. 1915), 153 N. W. 566.

but also the freight charge paid, and it was further held that the railway company was entitled to a judgment against the grain dealer for the amount which it was required to pay on the judgment rendered against it.<sup>51</sup> Sometimes a wrongful delivery becomes ratified. Thus the consignee may accept the goods and give a check for them. But in order to release a carrier from wrongful delivery on the ground that the person injured thereby has ratified the delivery, it must plainly appear that the ratification was intended and took place with full knowledge on the part of those to be affected thereby of all the material facts.<sup>52</sup> In all cases of wrongful delivery by carriers without the surrender of the bill of lading, the controlling consideration in determining whether the acceptance by the shipper of a draft, check, or partial payment from the consignee constitutes a ratification of the wrongful delivery is whether the acceptance of such paper or part payment was intended as a ratification.<sup>52 1/2</sup>

51. *E. G. Rall Grain Co. v. M. P. Ry. Co.*, (Kan. 1915), 146 Pac. 1180.

A railroad, which delivered a carload of beans to a person upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the consignee, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which another party is induced to act is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition. *Louisville & N. R. Co. v. McKay & Morgan* (Tenn. 1916) 182 S. W. 585.

An agent innocently presenting a false bill of lading made by his principal, receiving goods from a carrier, and remitting proceeds to his principal, without disclosing his agency to the carrier, held per-

sonally liable for the goods received. *Louisville & N. R. Co. v. McKay & Morgan*, (Tenn. 1916), 182 S. W. 585.

Where neither the shipper of a box, nor her agent, the expressman who delivered it to a steamship company for transportation, objected to the terms of a bill of lading which gave the address of the consignee differently from that appearing on the box, in the absence of fraud or any previous agreement the steamship company could rely on the bill of lading issued as expressing the entire contract, and was not liable for delivery to the consignee as indicated therein. *Porter v. Oceanic S. S. Co. of Savannah* (Mass. 1916) 111 N. E. 864.

52. *Kewanee Private Utilities Co. v. Norfolk Southern R. Co.*, (Va. 1916), 88 S. E. 95, 96.

52 1/2. *Kewanee Private Utilities*

**Acceptance by the Consignee.** As a general rule it is the duty of the consignee to receive goods consigned to it.<sup>53</sup> If, however, the property is so damaged as to be worthless, or materially injured, the consignee can refuse to accept. Of course a carrier is not liable either as carrier or as warehouseman for injuries to goods, no matter from what caused, after completion of its contract of carriage and complete delivery of the goods to the consignee, and an acceptance by him and subsequent assumption of full custody before the damage occurs.<sup>54</sup>

**9. Order-Notify Shipments.** A large part of the commerce of the country moves under what is known as order-notify bills of lading. This is a device resorted to by shippers in order to secure cash from consignees to whom they do not wish to extend credit. Originally the carriers did not deliver shipments without production of the bill of lading. The custom thereupon grew up of sending the bill of lading with a draft attached to a bank. The bank would notify the consignee and upon payment of the draft would release to him the bill of lading. As the commercial business of the country grew and the practice of selling in transit became more common a great deal of confusion arose. Consignees would divert shipments and direct carriers to deliver to third parties without requiring the production of the bill of lading. Inasmuch as the consignee is presumed to be the owner of the shipment the carriers followed these instructions. If the shipment was an order-notify one and the consignee by means of diversion or from some other process acquired the shipment without paying the draft, the shipper naturally held the carrier responsible. Considerable litigation arose and a great deal of confusion resulted as to whether the carrier was liable or not. Finally, the carriers adopted a form of bill of lading known as the "order-notify" form, which on its face expressly provides that the carrier will not deliver the shipment without surrender of the bill of lading properly endorsed. There has therefore grown up a branch of the law peculiarly applicable to order-notify bills of lading. The weight of author-

Co. v. Norfolk Southern R. Co.,  
(Va. 1916), 88 S. E. 95, 96.

53. Wien v. N. Y. C. & H. R.

R. Co., 152 N. Y. Supp., 154, 157.

54. Veitch v. I. C. R. R. Co.,  
(Ala. 1915), 68 So. 575, 576; also  
see pp. 52, 76, 77, 78.

ity is to the effect that an order-notify shipment is notice to the carrier and to the world at large that the seller reserves title to the goods and that he is the only person who can exercise dominion over the shipment until the bill of lading is released either by payment of the draft, or by the shipper waiving payment. In dealing with order-notify shipments it must be liable for a misdelivery, if it delivered to the consignee, or to is not used it is by no means settled that the carrier would not be liable for a misdelivery, if it delivered to the consignee, or to the consignee's order, on a shipment made under the regular bill of lading, but sent with draft attached. While the consignee is presumed to be the owner of the shipment it must be remembered that this is only a presumption, which, of course, may be rebutted. As between seller and purchaser, it is a general rule that the title to goods shipped under a bill of lading in favor of the seller or his agent with a draft attached does not pass to the buyer until he has complied with the conditions.<sup>55</sup> So where the

95. Case notes to 5 Ann. Cas. 263, and 2 L. R. A. (N. S.) 79. Arkansas Southern Railway Co. v. German National Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; Jersey v. State, 88 Ark. 270, 114 S. W. 216, 44 L. R. A. (N. S.) 463; Midland Valley Rd. Co. v. J. A. Fay & Eagan Co., 89 Ark. 342, 116 S. W. 1171; American Jobbing Ass'n v. Wesson, 92 Ark. 287, 122 S. W. 664.

South Deerfield Onion Storage Co. v. New York, N. Y. & H. R. Co., (Mass. 1916), 111 N. E. 367, 368; Alderman v. Eastern R. R., 115 Mass. 233; North Pennsylvania R. R. v. Commercial Nat. Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287.

Where the plaintiff retained title as shipper and consignee, but the bill of lading required that notice be given to S., the purchaser, he, not having paid the draft at-

tached thereto, acquired no title. South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co., (Mass. 1916), 111 N. E. 367.

Where wire fencing was shipped to a point in this state, with direction to notify plaintiff, and the bill of lading was indorsed with a direction to deliver the goods on order of a trust company, the duty of procuring the order or of obtaining authority from the consignor to deliver to plaintiff was on the plaintiff, and not on the carrier. Killingsworth v. Norfolk & S. R. Co., (N. C. 1916), 87 S. E. 947.

Goods shipped on an open bill of lading to a consignee who agreed to pay cash therefor by permitting the consignor to draw on him are delivered on condition, and, where the condition is broken by the consignee, the title thereto remains in the consignor. A. E. Myers & Co.



seller consigned the goods to itself at Newport, and sent the bill of lading with draft attached to a Newport bank, with directions that the bill of lading was not to be delivered to the purchaser until the payment by it of the draft, the bill of lading was used as a symbol of the property to express the seller's intention as to the conditions upon which the property should be delivered. Hence there was no absolute sale of the goods, and the goods were at the risk of the consignor until delivered to the consignee.<sup>56</sup> Therefore the delivery of the property shipped under

v. Norfolk Southern R. Co., (N. C. 1916), 88 S. E. 149.

56. Isbel-Brown Co. v. Stevens Grocer Co. (Ark. 1915) 175 S. W., 1158, 1159.

It is the well settled law that the carrier has no right to deliver a shipment to a consignee on an order notify bill of lading without production and surrender of the bill of lading.

Boatmen's Savings Bank v. W. & A. R. R. Co., 81 Ga. 221.

North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727.

Bass v. Glover, 63, Ga. 741.

Merchant's Bank v. Steamboat Co. 102 Md., 573.

General Electric Co. v. Southern Ry. 72 S. C. 251.

Union Pacific Ry. v. Johnson 45 Neb. 57.

J. M. & I. Ry. v. Irvin 46 Ind., 180.

Grason County R. R. v. M. C. & St. L. R. R., (Tex. 1904) 79 S. W. 1094.

Atlantic Coast Line Ry. Co. v. Dahlberg, (Ala. 1910) 54 So., 168.

Ark. Southern Ry. v. National Bank, 77 Ark. 482.

Harlow, Trustee, v. W. S. Ry. Co.

26 I. C. C., 511.

It will be found from an examination of the authorities cited above that an order-notify shipment is notice to the railroad that the title is reserved in the consignor and if the carrier delivers to the consignee without requiring the surrender of the bill of lading it does so at its peril. In *Furman v. U. P. R. R. Co.*, 106 N. Y. 579, the shipper made an order-notify shipment from New York to Denver, Colo. The delivering carrier received no notice that this was an order-notify shipment, but delivered the same to the consignee. A draft was made upon the consignee with the bill of lading attached, which was not paid for, and thereupon suit was brought against the delivering carrier for a conversion. The court held that it was the duty of the delivering carrier to ascertain the terms of the bill of lading and when it had done so, it would have found that this was an order-notify shipment. The court said, p. 587:

"\* \* \* It is argued here that even by the terms of the original bill of lading, Zucca Brothers were the consignees, and that being such they were presumptively the proper parties to

an order notify bill of lading, without surrender of the same, is a

whom to make delivery, and that there was no written, or any notification to the contrary, and hence, defendants were justified in such delivery. We do not agree to the correctness of this construction of the bill of lading. It acknowledges the receipt of the goods, their weight, and states the amount of freight to their destination, Denver, Colo., and says the goods are marked 'Y—order, notify Zucca Bros.' Here is no statement that Zucca Brothers are the consignees. The very presence of the word notify, in its relation to them, shows they are not intended as the consignees. If they were, the word is wholly unnecessary. It is the duty of the carrier to notify the consignee of the arrival of the goods. *Price v. Powell*, 3 N. Y. 322. To place in the bill of lading a direction to notify certain persons to whom, if consignees, it was the carrier's duty to deliver, or at least to notify of the arrival of the goods, is a plain notice that (in the absence of further directions) they are not the consignees. \*\*\*

To the same effect see *Farris v. B. & O. S. R. R. Co.* 143 Ill. App. 208.

In *Midland Valley R. R. Co. v. Fay & Egan Co.* (Ark. 1909) 116 S. W. 1171, the court said, p. 1172:

"\* \* \* As the machinery was shipped to the order of appellee, with the draft attached, the appellant had no authority to deliver it to the mill company, except upon the production of the

bill of lading properly indorsed by the shipper. *Arkansas Southern Ry. Co. v. German National Bank*, 77 Ark. 482, 487, 92 S. W. 522. The delivery of the machinery without the payment of the draft, or the production of the bill of lading properly indorsed (the appellee not consenting), was a conversion by which the appellant became liable to appellee for the value of the machinery. *Arkansas Southern Ry. Co. v. German National Bank*, 77 Ark. 482, 92 S. W. 522. *Jellett v. St. Paul, Minneapolis & Manitoba Ry. Co.* 30 Minn. 265, 15 N. W. 237. The failure of appellee to endeavor to recover possession of the machinery did not relieve appellant of the liability; nor would it have been relieved if it had reclaimed the property and tendered it to appellee, but such tender could have been only in mitigation of damages. 3 *Hutchinson on Carriers* (3d Edition) sec. 1374; *Norman v. Rogers*, 29 Ark. 365; *Plummer v. Reeves*, 83 Ark. 10, 13, 102 S. W. 376; 28 *Am. & Eng. Ency. of Law* (2d Ed.) 683, and cases cited above. There was nothing shown in this case to bar the recovery of damages, if any.\*\*\*

To the same effect see:

*The Union Stock Yards Co. v. Westcott*, 47 Neb. 300.

*Bank of Commerce v. Bissell*, 72 N. Y. 615.

*Joslyn v. G. T. R. R. Co.*, 51 Vt. 91.

*Libby v. Ingles*, 124 Mass. 503.

North v. The Transportation Co.  
146 Mass. 315.

National Bank of Chester v. A.  
& C. A. L. R. R. Co., 25 S. C.  
216.

Seaboard Airline Ry. v. Phillips  
(Md. 1908) 70 Atlantic 232.

Sometimes it is of considerable importance to solve the question whether placing the shipment on the side track of an order-notify consignee and permitting an inspection amounts to a conversion by the carrier, so as to make it chargeable for the entire value of the shipment. It is well settled that an unauthorized inspection does not render the carrier liable for a conversion. In *Dudley v. C. M. & St. P. Ry. Co.*, 58 W. Va. 604, 112 Am. St. Rep. 1027, the carrier permitted an unauthorized inspection because of which the goods were rejected. In this case the consignor made a shipment of apples under an order-notify bill of lading. The order-notify consignee was permitted to inspect without the production of the bill of lading and refused the shipment. The consignor was notified by the carrier of this refusal and then made claim against the initial carrier for the full value of the shipment. The delivering carrier then transported the goods to the nearest available market, sold them, deducted freight charges and tendered the balance to the shipper. The shipper refused to accept it and sued for the full amount. The court said, p. 1029:

"\* \* \* The theory of his claim, then presented, afterward asserted by this suit, and now urged here, as one ground of error in

the decree, is that the conduct of the defendant railway company amounted in law to a conversion of the apples to its own use. The argument to sustain this position treats the inspection allowed to Sharp's agent, as an authorized delivery of the property to him. That a common carrier is liable for a wrongful delivery, if in any way at fault, is perfectly clear. Such act may be treated as a conversion. Common carriers are bound to exercise the highest degree of care in this respect. No circumstances of fraud, imposition or mistakes will excuse the common carrier from responsibility for a delivery to the wrong person: *Hutchinson on Carriers* sec. 344. To the same general effect, see *North Pennsylvania R. R. Co. v. Commercial National Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287, and *Indianapolis, etc. R. R. Co. v. Hernon*, 81 Ill. 143, cited by counsel for appellant. Of course this general rule, like all others may be subject to some slight apparent exceptions, which need not be noticed here. But, if there was no delivery, the rule of law relied upon has no application. The property was never out of the possession of the defendant, until sold, or removed for sale, sometime after the inspection. Sharp's agent was simply permitted to enter the cars, set barrels out in his wagon, open them and examine the apples. Then they were put back in the car and it was resealed by the agent. It may be true that he had no

right to do so, and that the defendant did wrong in permitting the inspection, no evidence of title or right to possession having been shown, but it is a non sequitur to say, upon these facts there was a delivery. It may have been an authorized act of dominion over the property, but whose act was it? Clearly that of the railroad company, for the property was still in its actual and legal custody. It never parted with its possession. Not every wrongful act on the part of a common carrier authorizes an action against it as for a conversion. Where goods intrusted to a common carrier, are injured only the owner's remedy is for damages for the injury, not their value; *Hutchinson on Common Carriers*, sec. 770a. For delay in delivery, the action must be for damages resulting, not the value of the property: *Hutchinson on Common Carriers*, sec. 328; *Ryland and Rankin v. Chesapeake etc. Ry. Co.*, 55 W. V. 181, 46 S. E. 923. What is the nature of the plaintiff's injury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such a claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found. \* \* \*

It will be noticed that in this case the court did not decide what

would be the measure of damages. It simply decided that the consignor could not recover the full value. In *Schopp Fruit Co. v. M. P. R. R. Co.*, 115 Mo. App. 352, the consignor made an order-notify shipment of apples, allowing inspection. The goods were placed on the order-notify consignee's switch track, inspected by it and rejected. The consignor sued the carrier for a conversion and the court said:

"\* \* \* The suit is in conversion for the value of one hundred and eighty barrels of apples. To show a conversion it was incumbent on the plaintiff to prove that the apples were actually or constructively delivered to the Bonham Grocery Co. Plaintiff concedes this much. As a demurrer to the evidence was given, plaintiff invokes the settled rule of practice, that in determining whether or not plaintiff made out a prima facie case, every act and reasonable inference that the proof justifies must be taken as true. (*Pauck v. St. Louis Beef & Provision Co.*, 159 Mo. 467, 61 S. W. 806; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827; *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597, 78 S. W. 70; *Ladd v. Williams*, 104 Mo. App. 390, 79 S. W. 511). There is no positive or direct proof of the delivery of the apples to the Bonham Grocery Company. There are, however, two facts shown by the evidence from which plaintiff insists a delivery should be inferred; first, that the car was placed on a

switch track along side of the grocery company's warehouse; and, second, that the grocery company took four barrels of apples from the car and delivered them to its customers on an order previously taken. The way bill and the bill of lading both contain a memorandum to notify the Bonham Wholesale Grocery Company of the arrival of the car and to allow inspection; thus clearly indicating that plaintiff expected the grocery company would handle the apples and granted it the privilege of inspecting them. The railroad company, therefore, by placing the car on a side-track near the grocery company's warehouse, simply followed the directions given it by plaintiff by placing the car as conveniently as possible to the grocery company's warehouse for the purposes of inspecting and unloading the apples, in the event the grocery company should conclude to take them, the railroad company retaining possession and control of the car, as the evidence clearly shows it did. No inference of delivery can be inferred from this proof. \* \* \*

It seems to be the trend of the authorities that where the consignee is a receiver of carload freight, and owns its own side-track, delivery is complete when the car is set for unloading at the usual and customary place for doing this on such side-track.

Lewis v. N. Y. O. & W. Ry. Co.,  
210 N. Y. 429.

Lyons v. N. Y. C. & H. R. R. Co.,  
119 N. Y. Supp. 703.

Moore on Carriers (2d Edition)  
vol. 1, page 241.

Anchor Mill Co. v. Burlington  
& Sioux Falls Ry. Co., 102 Ia.  
262.

Chicago & Etc. Ry. Co. v. Kelm,  
121 Minn. 343.

In Lyons v. N. Y. C. & H. Ry. Co.  
119 N. Y. Supp. 703 it was held that under an order-notify shipment it was not the duty of the carrier to place the car on the delivery track until the consignee was prepared, by the presentation of the bill of lading, to receive the contents of the car.

The general rule as to when delivery of a car load of freight is complete is well stated in C. M. St. P. Ry. Co. v. Kelm, 121 Minn. 343, where the court said:

"\* \* \*Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the cars upon a track designated by the consignee for that purpose, or if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it is held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated.\* \* \*

To the same effect in addition to the authorities cited, see:

Pittsburg v. Nash, 43 Ind. 423.

Pindell v. St. Louis, 41 Mo. App.  
84.

Cohan v. Missouri, 126 Mo. App.  
244, 102 S. W. 1029.

Chicago v. Kendall, 72 Ill. App. 105.

Gregg v. Illinois, 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238.

Paddock v. Toledo & O. C. Ry., 11 Ohio C. D. 789.

Independence Mills v. Burlington, 72 Ia. 535, 34 N. W. 320, 2 Am. St. 258, and South v. Wood, 66 Ala. 167, 41 Am. Rep. 449.

Arthur v. St. Paul & D. R. Co., 38 Minn. 95; Riley v. Horne 5 Bingham 217.

Nass v. C R. I. & P. Ry. Co., 96 Minn. 84.

In the Anchor Mill Company v. the Railway Company, 102 Ia. 262, the court said, p. 265, concerning delivery to a side-track:

"\* \* \*What will constitute a delivery must of necessity depend upon circumstances. The railroad company, in order to deliver this wheat in bulk certainly could not be expected to unload it. All that could be required was that it place the car where it could be safely and conveniently unloaded by the party entitled to it, and notify him of his action. When it had done this, its duty as a common carrier ended. Independence Mills Co. v. Burlington, C. R. & N. Ry. Co., 72 Ia. 535 (34 N. W. Rep. 320). In this case the car was put at the very place plaintiff had requested, for the purpose of being unloaded, and the plaintiff duly notified of its action. What more could the railway company do to complete the delivery?"

It is well settled that it is the duty of the consignee to unload car

load freight. There is no question but that the custom throughout the country is to place car load freight for unloading on the consignee's side-track, and when this is done, delivery is considered complete by the carrier. Bearing this in mind, from a review of the cases the weight of authority seems to be that when the carrier places car load freight on the side-track delivery is at once complete. The uniform "order" bill of lading contains near the top, on the first page, the following provision in heavy type:

"The surrender of this Original Order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by shipper."

If the carrier placed the goods on the side-track and notified the consignee that the shipment was there for it, the carrier is liable as for a conversion, and the measure of damages would be the invoice price of shipment to the consignee at the time and place of shipment. If, however, it placed the goods on the side-track, and notified the consignee that it was there simply for inspection, then, if the bill of lading did not contain a provision to allow inspection, or the carrier otherwise authorized to permit it, the inspection would be unauthorized and the carrier liable for the damages resulting from the same. It would not be liable as for a conversion, but for the difference between the

wrongful conversion of the property.<sup>67</sup> And under an order-notify bill of lading, the person to be notified but not named as consignee, has not even the right to inspect

invoice price to the consignee at the time and place of shipment, as defined in sec. 3 of the uniform bill of lading, if made thereunder, and the market value of the shipment at the time of rejection in the nearest available market.

57. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.* (Ind. 1915), 108 N. E., 978, 981.

A bill of lading must be properly indorsed before the carrier is justified in making delivery. *Killingsworth v. Norfolk & S. R. Co.*, (N. C. 1916), 87 S. E. 947.

A carrier of property which by the terms of the bill of lading is deliverable to the shipper's order is liable for its value to the true owner if he delivers it to the consignee or any one else without such order. *Killingsworth v. Norfolk & S. R. Co.*, (N. C. 1916), 87 S. E. 947.

A bill of lading is regarded as the symbol of the property described therein, and its delivery by the holder and consignor to a bank with draft attached is equivalent to a delivery of the property so far as they are concerned. *Vehicle Supply Co. v. McInturff*, (Ark. 1915), 179 S. W. 999.

The fact that a carrier was instructed to notify plaintiff of the arrival of goods gave plaintiff no right to require a delivery without the production and surrender of the bill of lading properly indorsed. *Killingsworth v. Norfolk & S. R. Co.*, (N. C. 1916), 87 S. E. 947.

A stock buyer, who had been

shipping hogs to commission merchants with instructions to sell them on commission, shipped hogs and received a "straight" bill of lading designating the commission merchants as consignees. He indorsed the bill of lading in blank and delivered it, with a draft on the commission merchants, to a bank, which discounted the draft. Before the draft was presented to the commission merchants, and before notice to the commission merchants of the transfer of the bill of lading the commission merchants received the hogs from the carrier and sold them. Held, that the sale of the hogs was not a tort, and did not render the commission merchants liable in trover to the bank, since, while the transfer of an "order" bill of lading may be deemed evidence of an intended pledge of the chattels described therein, as an assignment of the shipper's rights against the carrier, a straight bill of lading is not a true document of title, possession of which is symbolic of actual possession, and the carrier's possession is on behalf of the consignee, and though the consignor may transfer his interest in the shipment, neither he nor his transferee can disturb the effect of the straight bill of lading as against the carrier or the consignee without notice. *C. E. White & Co. v. Century S. Bank of Des Moines, Ia.*, 229 Fed. 975.

the shipment without surrender of the bill of lading.<sup>58</sup> And when goods are shipped to the order of the consignor the carrier will not be justified in delivering them without such order by the fact that one of the employes of the shipper said the property was for a certain person.<sup>59</sup> So where a railroad wrongfully delivered an auto truck shipped under an order notify bill of lading without first requiring the surrender of the bill of lading, the fact that the consignor sent men to repair parts on the truck in an effort to induce the consignee to accept and pay for the same, did not release the carrier from liability for conversion.<sup>60</sup> However a shipper by correcting the address in an order-notify bill of lading after a steamer has sailed which compelled it to ship the goods by rail some three hundred miles from the port originally named to a port at which it did not touch, is a waiver of the conditions requiring the surrender of the bill of lading before delivering the goods.<sup>61</sup>

**10. Right to Sell.** When freight is rejected by the consignee or the freight charges not paid, the carrier has the right to sell the goods for charges, if the shipper does not take immediate action to protect them. In selling the property, however, the carrier must proceed strictly according to the statute of the state in which the sale is held. Any deviation from the statute makes the selling void and renders the carrier liable for conversion. So if a railroad company which holds a sale of unclaimed freight fails strictly to comply with the state statute by giving notice of the time and place of the sale to the owner, consignee or consignor, it is liable for the value of the property at the time and place of conversion.<sup>62</sup>

58. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.* (Ind. 1915), 108 N. E., 978, 981

59. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.*, (Ind. 1915), 108 N. E., 978, 982

60. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.*, (Ind. 1915), 108 N. E., 978, 982.

61. *Miles Mfg. Co. v. North Ger-*

*man Lloyd S. S. Co.*, 151 N. Y., Supp. 881.

62. *Horton v. Tonopah & Goldfield R. Co.*, 225 Fed. 406, 409.

*Vernon's Sayles' Ann. Civ. St. 1914*, art. 725. authorizing a carrier to sell unclaimed freight "offering each box, bale \* \* \* or other article separately as consigned" requires the carrier to offer each



Where a carload of fruit shipped from Chicago to New York was seized under a replevin writ on November 1st, order for its sale as highly perishable obtained on November 2nd, and sold on November 3rd, but notice to consignee not given until November the 4th, the carrier is liable to the consignee for the value of the shipment and is not relieved by having turned the proceeds over to the third person who sued out the replevin writ or by the cancellation of the replevin bond.<sup>63</sup>

A railroad company which has a relative of one of its employees secretly act for it as an agent to bid in unclaimed freight at a sale not held in strict compliance with a statute of the state in which the sale is held is guilty of conversion.<sup>64</sup> Since no valid sale of undelivered freight can be made by a carrier unless the statutory method is strictly pursued, the burden is on the carrier to show that the sale was regularly conducted.<sup>65</sup> Therefore a carrier which has sold lumber for freight and demurrage charges in strict compliance with the state statute regulating the sale of unclaimed freight is not liable for conversion.<sup>66</sup>

11. **Warehousing.** The carrier's liability as a warehouseman begins when its liability as a carrier ends. The general rule, well settled, is that the common law liability of the carrier ends when the goods reach their destination and the consignee has had a

box or bale or other article separately unless the freight is consigned in bulk, in which event the sale must be in bulk, and where fertilizer is shipped in bags, each weighing a specified number of pounds, and described in the bill of lading as a specified number of "bags complete fertilizer, weight 26,000 pounds," the carrier selling the same as unclaimed freight cannot sell the same in bulk, but must offer each bag separately; the word "bulk" having reference in law to merchandise which is neither counted, weighed, nor measured, and the words "as consign-

ed" having no other meaning than that the articles to be sold shall be sold in the manner in which consigned as evidenced by the bill of lading. *Texas & P. Ry. Co. v. Gate City Fertilizer Co.*, (Tex. 1915), 176 S. W. 868.

63. *Martorana v. Baltimore & Ohio R. Co.*, (N. Y. 1915), 151 N. Y., Supp. 841.

64. *Horton v. Tonopah & Goldfield R. Co.*, 225 Fed. 406, 409.

65. *Horton v. Tonopah & Goldfield R. Co.*, 225 Federal Reporter, 406, 407.

66. *Horton v. Tonopah & Goldfield R. Co.*, 225 Federal Reporter, 406, 407.

reasonable time, after notice, to accept them, and fails to do so, or refuses to accept them, and thereupon the liability of the carrier as a warehouseman commences and no duty devolves upon the carrier, as a matter of law, to notify the consignor, at least where the consignee appears presumptively to be the owner, of the refusal of the consignee to accept the goods, unless in the circumstances of the particular case reasonable care requires it.<sup>67</sup> The liability of a carrier which holds goods as a warehouseman for loss by fire is not governed by the state

67. *Weed v. Barney*, 45 N. Y., 344, 6 Am. Rep. 96; *Bacharach v. Lehigh Valley Ry.*, 143 App. Div. 117, 127 N. Y. Supp., 607; *Manhattan Shoe Co. v. C. B. & Q. R. R. Co.*, 9 App. Div., 172, 41 N. Y. Supp. 83; *Fenner v. Buffalo & St. L. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709. *Wien v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Supp., 154, 156.

The parties to an interstate shipment may not, by special agreement, alter the conditions specified in the bill of lading governing the carrier's liability when a shipment is not removed within forty-eight hours after notice to the consignee of its arrival, which conform to the carrier's published regulations. *Southern R. Co. v. Prescott*, 36 Sup. Ct. 469, 240 U. S. 632; 60 L. Ed.—

The liability of a carrier as a warehouseman is based on negligence, and it is not an insurer of the goods. *Chicago, R. I. & P. Ry. Co. v. Stouffer*, (Ind. 1916), 111 N. E. 809.

Where an express company offers to make delivery at the consignee's place of business, and the consignee declines for reasons of his own convenience, the company's liability as a common carrier then terminates, and the consignee has

no power to prolong such liability, however inconvenient it may be for him to receive the goods. *Southern Express Co. v. Potter Bros.*, (Tenn. 1916), 183 S. W. 157.

Where an express company offered to make prompt delivery of a consignment of goods, and its liability as carrier was determined by the consignee's request that they be left on the station platform for his convenience, and the company, to protect them from trespassers, put them in the station, its liability was only that of a warehouseman, and, where the station was burned without its fault, it was not liable for the value of the goods. *Southern Express Co. v. Potter Bros.*, (Tenn. 1916), 183 S. W. 157.

A carrier of bananas, independent of the contract of shipment, owed the owner the duty to preserve the property after it reached destination until it was delivered. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

A transferman's duty as carrier ends with delivery of the goods intrusted to him at the place of destination. If, for any reason, he is not there relieved of their actual custody or possession within a reasonable time, he is under a differ-

law, but by federal law.<sup>68</sup> So the measure of the carrier's liability as warehouseman under a bill of lading for an interstate shipment, issued pursuant to the Interstate Commerce Act, which, in accordance with the carrier's published regulations, provided that every service to be performed under it should be subject to the conditions specified, among which was an express condition governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival,—is not to be tested by the exceptional rule of the local law, placing the burden upon a warehouseman, in case of loss by fire, to show that it was not negligent.<sup>69</sup> But the arrival of an

ent, further, and less exacting duty to provide for their safety, for another reasonable period of time, the degree of which duty is determined by the principles of law applicable to warehousemen. *Brown Shoe Co. v. Hardin*, (W. Va. 1916), 87 S. E. 1014.

68. *Southern R. Co. v. Prescott*, 240 U. S. 642, 60 L. Ed—, 36 Sup. Ct. 469, 473.

This is so because with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates, (*Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C. 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to

any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend "any privileges or facilities," save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed—, 36 Sup. Ct. 469, 472.

69. *Southern R. Co. v. Prescott*,

interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part thereof, leaving the rest, with the carrier's permission, to await his convenience in removal, did not discharge the carrier's liability under the bill of lading issued pursuant to the Act, nor create a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of loss by fire, the burden of showing that it was not negligent, where the bill of lading, in accordance with the published regulations, provided that every service to be performed under it should be subject to the conditions governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival.<sup>70</sup> Therefore, the liability of a terminal carrier in an interstate shipment for a loss due to its negligence while the goods were in its possession as warehouseman at the place of destination must be regarded as controlled by a limitation to an agreed valuation made to adjust the rate contained in the uniform bill of lading issued by the initial carrier, in view of the provisions of the Hepburn Act, enlarging the definition of the term "transportation" so as to include all services rendered in connection therewith, and of a provision of the bill of lading that "every service to be performed hereunder"

240 U. S. 632, 60 L. Ed.—, 36 Sup. Ct. 469, 470.

70. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed.—, 36 Sup. Ct. 469, 470.

In *Cleveland, C. C. & St. L. Ry. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed.—, 36 Sup. Ct. 177, 180 the United States Supreme Court said:

"From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to

prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled

is subject to all the conditions therein contained.<sup>71</sup> The liability of a carrier as warehouseman is involved so frequently that the question of such liability is a very important one. Frequently when goods are refused at destination, or the consignee cannot be found, the proper care to be given the shipment is often a vexing question. If the carrier keeps the goods on the side-track demurrage accrues. If it stores the goods the shipment may not bring the freight and storage. Furthermore, the shipper may refuse to pay the warehousing charges on the ground the storage was not authorized, and thus the right of the warehouse to a lien be involved. It seems, by the weight of authority, the right of a carrier to store an unclaimed shipment, notify the consignor, and thereafter the warehouse charges are a valid lien against the shipment.<sup>72</sup> Of course, the carrier as warehouse-

to some weight. It recognizes—whether correctly or not is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods. We conclude that, under the provisions of the Hepburn act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman."

71. *Cleveland, C. C. & St. L. R.*

*Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed.—, 36 Sup. Ct. 177.

72. The warehouse as an innocent third party, is not a party to the contract of transportation. Under the law of practically every state in the Union a warehouseman has a lien for his charges. Therefore as far as the possession of the warehouse company is concerned, it can legally hold the shipment for its charges.

Now assuming the shipment is ultimately sold for charges and the amount obtained does not cover the storage charges, who is to pay the difference? This question can only be answered with reference to the facts surrounding each particular case. The only theory on which a shipper can be held is that he has in some way authorized the carrier to store the goods. If the shipper has not expressly or impliedly given the carrier authority to store the goods for his account, then the carrier is liable to the warehouse and not the shipper.

Express authority to store the shipment, of course would be an instruction to the railroad to do so. Implied authority may arise for instance in this way. The carrier might notify the shipper that the goods had been rejected and unless otherwise directed would place them in a specified public warehouse, and the shipper by not countermanding such proposal might be held to have impliedly authorized it. But the mere rejection of the goods by the consignee does not authorize the railroad company to store the goods with a warehouse so that the shipper in total ignorance of such proceeding can after a long period be held for the charges over and above the value of the shipment.

In this connection it must be remembered that circumstances may arise where although the carrier may not originally have the authority to store the goods, still the shipper may by subsequent action ratify such act. This is why each case has to depend upon its own facts.

Now as to the right of the carrier to store the goods. If a consignee fails or refuses to receive the goods, it is the duty of the carrier to properly conserve the shipment. It is therefore its duty to store the goods and in many jurisdictions to immediately notify the consignor of the consignee's refusal to receive the goods.

*T. & E. Eddy*, (U. S.) 5 Wall., 481, 18 L. Ed. 486.

*American Sugar Refin. Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383.

*Alabama, etc., R. R. Co. v. McKenzie*, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18.

*American Merchants' Union Exp. Co. v. Wolf*, 79 Ill. 430.

*Michigan Cent. R. R. Co. v. Harville*, 136 Ill. App. 243.

*Nashville, etc. R. Co. v. Dreyfuss-Weil Co.*, 150 S. W. 321, 150 Ky. 333.

*Carrizzo v. New York, etc., R. Co.*, 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S. 579.

*Manhattan Rubber Shoe Co. v. Chicago, etc. R. Co.*, 41 N. Y. S. 83, 9 App. Div. 172, 75 N. Y. St. Rep. 544.

There are cases which hold to the contrary:

*Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.), 356.

*Steamboat Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123.

*Lesinsky v. Great Western Dispatch*, 13 Mo. App. 575.

*Hull v. Missouri Pac. R. Co.*, 60 Mo. App. 593.

*Hudson v. Baxendale*, 2 H. & N. 575.

The courts of the country are divided on this question but the weight of authority is that the notice of rejection must be given to the consignor.

Except in those few jurisdictions, therefore, which hold a contrary doctrine, the carrier can not collect for storage charges unless notice has been given the consignor of the rejection or non-acceptance of the goods. Storage charges, to be legally applicable by the carrier, must be filed with the Interstate Commerce Commis-

man, is not an insurer, and only liable for loss if it fails to use ordinary care.<sup>72½</sup>

**12. Baggage.** Since the liability of the carrier concerning baggage is peculiar this subject is considered by itself. A carrier,

sion, and if they are not, they cannot be collected.

72½. The difference between a carrier's obligations as insurer and warehouseman is illustrated by the following excerpts from leading text writers.

Moore on Carriers, Second Edition, p. 236, states the law as follows:

"Where, however, the relation of the parties is not that of carrier and owner or consignee, or where the responsibility of the carrier has terminated and that of warehouseman has commenced or exists, the strict rule of responsibility as insurer does not prevail, and the carrier is responsible for proper diligence and care only in the preservation of the property and its delivery to the true owner, and liable only for losses resulting from its own negligence."

Michie on Carriers, p. 910, states the rule as follows:

"It is held that a carrier which has carried property for hire and is keeping it for a reasonable time in its own warehouse, at the point of destination, until it shall be called for, is a bailee for hire. As such it is liable only for the want of ordinary care in the custody of the goods; and the care exercised should be in proportion to the loss likely to be sustained by want of such care. A carrier as warehouseman is li-

able for the loss or destruction of goods caused by its negligence. In the absence of negligence on its part a carrier is not liable for damages caused to the goods by storm, or for their loss by theft or fire. A carrier, as warehouseman, is not liable for the destruction of goods, caused by the negligence of its employee, who was an independent contractor."

In other words if the carrier's liability as insurer has ceased different facts must be shown to make it responsible as warehouseman, than are necessary to hold it liable as carrier.

The rule governing cases of this kind is well stated in Hutchinson on Carriers, third edition, section 685, as follows:

"Whenever the carrier can show that the delivery was impossible, from inability to find the consignee, or from his refusal to accept the goods, or from his unreasonable delay in taking them away, when that duty devolves upon him according to the course of the business of the carrier, or that from any other cause his obligation as carrier has ceased and the less burdensome one of warehouseman has supervened, he may further show that the loss which has occurred was not attributable to his fault or negligence, and

with respect to baggage accompanying a passenger, intrusted to its custody, incurs the responsibility of a common carrier of goods and is liable as an insurer of the baggage, except where the loss or damage is caused by the act of God, the act of the owner, or by the public enemy.<sup>73</sup> It is the duty of the carrier to deliver a passenger's baggage, whether within the weight prescribed by statute or not, immediately upon the arrival of the passenger at his destination.<sup>74</sup> And where a carrier accepts as baggage the sample trunks of a traveling salesman, with know-

thereby exonerate himself from liability. If, for instance, the goods have been destroyed by an accidental fire; by an explosion of dangerous goods, of the character of which he was not aware; by leakage from a defect in a cask; or have depreciated in market value; or have been lost by theft or robbery, without the fault or negligence of the carrier, and he can show that his relation to the goods as common carrier had, before such loss, been changed to that of a mere custodian of the goods for the consignor or owner, he will be excused, although he would have been unquestionably liable in his character as carrier."

73. *Kansas City M. & O. Ry. Co. v. Fugatt*, (Okla. 1915), 150 Pac. 669.

74. *Kansas City M. & O. Ry. Co. v. Fugatt*, (Okla. 1915), 150 Pac., 669, 670.

Under Rev. St. 1909, § 3239, providing that no liability shall accrue to carriers for the transportation of jewelry when carried as baggage, except by special contract between carrier and shipper, where a passenger's jewelry was carried in his trunk as baggage

without special contract and without knowledge on the part of the road or its agents of the contents of the trunk, a railroad was not liable for the loss of such jewelry. *Strome v. Lusk*, (Mo. 1915), 180 S. W. 27.

Under Revisal 1908, § 2618, prescribing railroad charges for transporting a passenger and his "baggage," not exceeding 200 pounds in weight, where a railroad passenger negligently omitted to have his suit case checked when he had ample time to do so to have it carried on the same train with him, the railroad, transporting it the next day without compensation, was liable only as a gratuitous bailee, since the passenger has the right to have baggage transported free of charge as part of the consideration for the price of his ticket only when it accompanies him on the same train, unless prevented by the carrier's negligence or default. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156, 157.

Where ordinary passenger's baggage in trunks is accepted by a carrier and a check issued, the check is only prima facie evidence of the receipt of the trunk by the



ledge of their character, it thereby waives any objection on the ground that such trunks and contents are not properly baggage, and its liability therefor is the same as that with reference to ordinary baggage.<sup>75</sup> Where a passenger, whose business was to travel with fairs and circuses operating a shooting gallery, in connection with which he used cheap jewelry as prizes, carried such jewelry aboard the train, the railroad was not liable for loss of such jewelry as an insurer, for the articles were not the passenger's baggage, not having been taken for his personal use, but were merchandise.<sup>76</sup> And where a person, taking passage, carried with him a tent in which he lived and blankets in which he slept in pursuance of his business of traveling with fairs, circuses, and picnics to operate a shooting gallery, the carrier was liable for the loss thereof as an insurer, since the articles, worth \$17, were "baggage," articles for the personal use and comfort of the passenger at the end of his journey, in view of his station in life, occupation, purpose of the journey, and their value.<sup>77</sup> Though one accepting and using a ticket for transportation was unable to read English, and was told by the carrier that it would be unnecessary to insure his baggage, he was bound by the terms of his ticket, limiting liability for loss of baggage to a certain amount.<sup>78</sup> Where a passenger checks his

carrier; nor is the situation different where the baggage consists of drummer's trunks. *Davis v. Atlantic Coast Line R. Co.*, (S. C. 1916), 88 S. E. 273, 274.

75. *Kansas City, M. & O. Ry. Co. v. Fugatt*, (Okla. 1915), 150 Pac., 669, 670.

76. *Strome v. Lusk*, (Mo. 1915), 180 S. W. 27.

77. *Strome v. Lusk*, (Mo. 1915), 180 S. W. 27.

78. *Secoulsky v. Oceanic Steam Nav. Co.*, (Mass. 1916), 112 N. E. 151.

Where a steamship company's agent represented to a passenger that the company would be liable for the value of her baggage, the

fact that after she arrived at the wharves and was in the Emigrant Halls a contract, limiting liability, was delivered to her does not limit her rights, it appearing that the contract was written in a language which she did not understand, and that she never signed it or acted thereunder other than to accept passage for which she had already paid. *Drozinski v. Hamburg-American Line*, (Mo. 1916), 181 S. W. 1164.

In a passenger's action for loss of baggage, where the contract of carriage as contained in her transportation was made in a foreign country, but there was no evidence

baggage in time to have it transported with him, and it is not done, or, if the baggage is checked through over different lines, and the connection is so close at some point that there was no time to transfer it to the passenger's train, or where the baggage, for any cause within the control of the carrier, is carried on another train, it retains its character as baggage, and the carrier is liable for its safety as an insurer.<sup>79</sup> But where a passenger checks his baggage on another train than the one he rides on for extra compensation, the railroad is liable for loss of or injuries to it as a carrier of freight.<sup>80</sup> So the liability of a railroad for a passenger's baggage not transported on the train with him and for no extra compensation is that of a gratuitous bailee, who is answerable for gross negligence, which is the failure to exercise the care of a person of ordinary prudence undertaking to carry the goods of another without compensation.<sup>81</sup> Proof of delivery to the carrier of baggage carried for nothing by it on a different train from the passenger's and of the carrier's failure to deliver is evidence sufficient to take the case to the jury and support a verdict, though the carrier is not liable unless the jury finds that it did not exercise the care of an ordinary person of prudence under the circumstances.<sup>82</sup> But where there is a dispute between the carrier and the passenger as to payment of excess baggage fare at receiving station, it is the passenger's duty to make a full explanation of his claim and of the circumstances leading thereto to the carrier.<sup>83</sup> The mere fact that a rule of a carrier required that a check be attached to baggage if excess charge was paid thereon and that no such check was attached to the baggage involved would not defeat the right of the passenger to demand his baggage without paying excess, if, in fact, he had already paid the

as to the law of such foreign country, the law of the forum governs. *Drozinski v. Hamburg-American Line*, (Mo. 1916), 181 S. W. 1164.

79. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156, 157.

80. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156, 157.

81. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156, 157.

82. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156, 157.

83. *Davis v. Atlantic Coast Line R. Co.*, (S. C. 1916), 88 S. E. 273, 274.

charge and the check had not been attached.<sup>84</sup> And where a passenger fully informs the agents of the carrier as to the reasons for his refusal to pay excess baggage fare, and the fare had already been once paid, but the agents without inquiry hold the baggage for payment of the charges, the jury might find punitive damages.<sup>85</sup> The contract of the carrier to transport a passenger includes the duty to transport a reasonable amount of personal effects and hand luggage, including a reasonable amount of money for traveling and other incidental expense, jewelry, watches, clothing, and such other articles of personal convenience, pleasure, and comfort as are reasonably suited to the passenger's station in life, the journey he is taking, and possible accidents, sickness, and sojourning on the way, for which a reasonably prudent man, under the circumstances, would provide.<sup>86</sup>

84. *Davis v. Atlantic Coast Line R. Co.*, (S. C. 1916), 88 S. E. 273, 274.

85. *Davis v. Atlantic Coast Line R. Co.*, (S. C. 1916), 88 S. E. 273, 274.

86. *Repp v. Indianapolis, C. & S. Traction Co.*, (Ind. 1916), 111 N. E. 614.

Where the plaintiff, an old and infirm man, while a passenger on a street car, was forcibly assaulted and robbed of his pocketbook and \$290, in the presence and view of the carrier's

conductor, who failed to protect him when called upon, altho young, athletic, and capable of preventing the robbery, and who failed to call upon other passengers, who would have helped if called upon, he failed to exercise ordinary care to protect the plaintiff's personal effects, and the carrier was liable, as a carrier is under a duty to exercise reasonable care to protect passengers from the loss of personal effects retained in their possession. *Repp v. Indianapolis, C. & S. Traction Co.*, (Ind. 1916), 111 N. E. 614.

## V.

### LIABILITY FOR NEGLIGENCE

#### A. CARMACK AND CUMMINS AMENDMENTS.

1. Initial Carrier.
2. Connecting Carrier.
3. Delivering Carrier.

1. **Initial Carrier.** As has been pointed out there was a great deal of confusion concerning the liability of the initial carrier, and to reconcile the various views on the subject the Carmack Amendment was passed. Now the manifest effect of the Carmack Amendment was not to impose upon the initial carrier a liability for its own conduct different from or greater than that imposed upon it by the common law, but to impose upon it in favor of the shipper the liability to him under the common law incurred by its connecting carriers.<sup>1</sup> So the only new right of action given the legal holder of a bill of lading in interstate commerce shipments is against the initial carrier, where the primary cause of liability is upon the subsequent connecting carrier.<sup>2</sup> Therefore the Carmack Amendment merely

1. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Tex. 1915), 178 S. W., 810, 813.

The Carmack Amendment does not, though the federal act requires the issuance of a bill of lading, prevent the initial carrier from becoming liable for such negligence, where though no bill of lading was issued, a through shipment was undertaken. *Keithley v. Lusk* (Mo. 1915) 177 S. W. 756.

Where an initial carrier issued a through bill of lading for an inter-

state shipment of horses which was to be made also over other lines, it is liable for the negligence of connecting carriers, and proof that the horses were injured during transit, without proof as to the line on which it occurred, will support judgment against it. *Jones v. Louisville & N. R. Co.* (Mo. 1916) 182 S. W. 1064.

2. *St. L. & S. F. R. Co. v. Hounts* (Okla.), 144 Pac. 1036, 1037.

Where a carrier on being noti-

places the shipper in a position where he may be able to recover for injured property and relieve himself, oftentimes, from the task of locating the active wrongdoer. But if the shipper knows which one among a number of carriers caused the injury, he may sue that one alone.<sup>3</sup> The Carmack Amendment fixes absolute liability upon the initial carrier. The initial carrier is given a cause of action against its connecting carriers,<sup>3½</sup> and, if such carrier is insolvent, that misfortune cannot deprive the shipper of his cause of action against the initial carrier. The fact that the initial carrier may not be able to recover from the connecting line is unfortunate for the initial carrier, but cannot affect the validity of the statute.<sup>4</sup> And the rule prevailing that proof of delivery of live stock to an initial carrier, in a continuous line of shipment, in

fied of the refusal of the original consignee to pay for the goods informed the consignor, after investigation, that it located the goods and indorsed on the original bill of lading a statement that they were reconsigned to another, a new contract of shipment was entered into which was binding on the carrier, even though not consented to by the original consignee, and the carrier was liable to the second consignee for failure to deliver the goods. Such a carrier was an initial carrier within the Carmack Amendment, even though before the reconsignment the goods had been delivered to another carrier, since the shipment originated on its line, and the only contract of carriage was made by it. *A. E. Myers & Co. v. Norfolk Southern R. Co.*, 88 S. E. (N. C.) 149, 150.

3. *Galveston Ry. Co. v. Piper*, 52 Tex. Civ. App. 568, 115 S. W., 107; *Otrich v. Ry. Co.*, 154 Mo. App. 420, 134 S. W. 665; *McMillan v. C. & St. L. Ry. Co.*, 147 Iowa, 596, 124 N. W. 1069; *Trade-*

*well v. C. & N. W. Ry.*, 150 Wis. 259, 136 N. W. 794; *Uber v. C. M. & St. P. Ry.*, 151 Wis. 431, 138 N. W. 57; *Elliott v. C. & St. P. Ry. Co.* (So. Dak. 1915), 150 N. W. 777, 778, 779.

A common carrier of goods and baggage is an insurer and liable for all injuries to and loss of property being transported, unless the injury or loss is caused by the act of God, the public enemy, the negligence of the shipper, or by the inherent qualities of the goods. *Perry v. Seaboard Air Line R. Co.* (N. C. 1916) 88 S. E. 156.

3½. Initial carrier may compel reimbursement from connecting carrier. *A. C. L. R. R. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed., 167, 31 Sup. Ct., 164.

4. *T. M. Ry. Co. v. King* (Tex. 1915), 174 S. W., 336, 337; *C. C. C. & St. L. Ry. Co. v. Hayes* (Ind., 1914), 104 N. E. 581, 585.

A packet company, the initial carrier of an interstate shipment which paid the shipper the value of goods destroyed by a connecting common carrier, had the right

good condition, and delivery by the final carrier in a damaged condition, makes a prima facie case against the carrier sued, entitling the shipper to go to the jury on the question of such carrier's liability, is not abrogated by the Carmack Amendment.<sup>5</sup> Thus the initial carrier of perishable produce is liable under the Carmack Amendment for the failure of a connecting carrier to make a market by a certain time.<sup>6</sup>

No doubt one of the strong reasons for the enactment of the Carmack Amendment, was the difficulty of the shipper in ascertaining the line on which the negligence occurred; but, no doubt, also, it was to protect shippers from the expense of instituting suits distant from their homes, perhaps in other states and in strange tribunals. Whatever may have been the reasons actuating Congress in passing the law, it fixes absolutely the liability of the initial carrier without regard to whether a caretaker accompanies a shipment or not, and regardless of the fact as to whether the shipper may know that the damages did not occur while the shipment was in the possession of the initial carrier.<sup>7</sup> The Carmack Amendment is in effect only for the purpose of enabling the shipper to obtain redress from the initial carrier for any breach of the original contract of shipment, regarded as the through contract,<sup>7½</sup> and does not cover damages arising from

to recover from such carrier the amount of damages it had been required to pay the shipper. *Joest v. Clarendon & Rosedale Packet Co.* (Ark. 1916) 183 S. W. 759.

5. *T. W. Mewborn & Co. v. Louisville & N. R. R.*, 87 S. E., 37.

6. *New York, P. & N. R. Co. v. Peninsula Produce Exch.*, 240 U. S. 34, 60 L. Ed.—, 36 Sup. Ct. 230.

7. *T. M. Ry. Co. v. King*, (Tex. 1915), 174 S. W. 336.

Of course on shipments moving entirely within the limits of one state the rule may be different, as in some states the carrier is permitted to limit liability to its own line. This is true in Texas. Thus where the initial carrier of

an intrastate shipment of live stock, though guilty of delaying transportation, delivered an hour and a half late the stock to the connecting carrier while its train was on its track, but the connecting carrier refused without cause to accept the stock and transport it in that train, thereby delaying transportation, the initial carrier was not liable for delay in the delivery of the stock at its destination. *St. Louis S. W. Ry. Co. of Texas v. Miller & White* (Tex. 1915) 176 S. W. 830.

7½. It matters not that the route is selected by the shipper, and is one over which the carrier has no through rate. *N. & W. Ry.*

the breach of a new contract entered into at destination and after arrival of the goods, between the shipper and the delivering carrier.<sup>8</sup> The theory is that the connecting carriers are to be treated as the agents of the initial carrier for the purpose of transportation and delivery, and the case as though the point of destination were on its own line, operated in different states. The goods not having been delivered, the presumption attaches that they were lost through the negligence of the initial carrier or its agents, and the burden of proof that the loss resulted from some cause for which the initial carrier was not responsible is thrown upon the carrier.<sup>9</sup>

The application of the Carmack Amendment has not caused a great deal of difficulty. This law is construed broadly. When it is remembered that a common carrier may not, by special contract, exempt itself from or evade its common-law liability for the consequences of its own negligence or that of its agents;<sup>10</sup> it is easy to accept as settled the doctrine that the initial carrier is liable for the loss of the property by any carrier over whose line the property may have passed.<sup>11</sup> The question of the right to limit liability is elsewhere discussed.<sup>12</sup>

The Cummins Amendment has not in any way changed the liability of the initial carrier, for a loss occurring on a connecting line. But as long as the goods are in the hands of a connecting carrier, as a carrier, the initial carrier is liable for any default.<sup>12½</sup> So under the Carmack Amendment an initial carrier is liable for any loss or injury to live stock caused through unnecessary delay or rough handling by an intermediate carrier.<sup>13</sup> But when once the status of carrier ceases, then the liability under the Carmack Amendment does not attach. So damages sustained by a shipper by reason of the failure of a delivering carrier to

v. Dixie Tobacco Co., 228 U. S., 593, 57 L. Ed. 980, 33 Sup. Ct., 609.

8. *Wien v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Supp., 154, 158.

9. *A. C. Cheney P. A. Co. v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Supp. 285, 293.

10. *U. P. R. Co. v. Libby*, (Colo. 1915), 146 Pac. 1076, 1078.

11. *A. C. Cheney P. A. Co. v. N. Y. C. & H. R. R. Co.*, 152 N. Y.

Supp. 285, 293.

12. See Chapter VIII.

12½. *Atlantic Coast Line v. Riverside Mills*, 219 U. S., 186, 55 L. Ed. 167, 31 Sup. Ct. Rep. 164.

13. *Texas Midland R. R. v. Becker & Cole*, 171 S. W., 1025, 1026; *N. J. P. & N. Ry. v. Peninsula Produce Exch.* (Md. 1914), 89 Atl. 433, 434.

return a shipment as requested after the original transportation had ended is not such damage or injury as is covered by the Carmack Amendment so as to make the initial carrier responsible for the ensuing loss.<sup>14</sup> And where damages resulted from the failure of the final carrier to return property refused by the consignee as requested by the shipper who accepted the suggestion from the carrier's agent, and took upon himself the negotiations of the agent with the final carrier for the return of the consignment, the initial carrier is not responsible under the Carmack Amendment.<sup>15</sup> A carrier of live stock cannot, under the Hepburn Act exempt itself by contract from liability for its negligence, or that of its servants, causing damage to an interstate shipment of live stock.<sup>15½</sup> It may, therefore, be stated that the liability of the initial carrier under the Carmack Amendment ends when the liability of the final carrier as a warehouseman commences.<sup>16</sup> But a limitation of liability applies to goods lost by a carrier acting as warehouseman, to the same extent as if lost while in its possession as a carrier.<sup>17</sup> It should be remembered, the provision of the Carmack Amendment that the holder of any bill of lading issued for interstate carriage should not be deprived of any right of action or remedy he had under the existing laws refers only to existing federal laws.<sup>18</sup> And in construing the Carmack Amend-

14. *Wien v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Suppl. 154.

15. *Wien v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Suppl., 154, 159.

15½. *Chicago R. I. & P. Ry. Co. v. Core* (Tex. 1915) 176 S. W. 778.

16. *Wien v. N. Y. C. & H. R. R. Co.*, 152 N. Y. Suppl., 154, 158.

17. *C. C. C. & St. L. Ry. v. Dettlebach*, 239 U. S. 588, 60 L. Ed.—, 36 Sup. Ct. 177.

18. *Stubblefield v. St. Louis & S. F. R. Co.* (Mo. 1916) 184 S. W. 149; *So. Ry. Co. v. Bennett* (Ga. 1915) 86 S. E. 418.

The Carmack Amendment does not abrogate or impair the separate

liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by state statutes or decisions. *Louisville & N. R. Co. v. Lynne* (Ala. 1916) 71 So. 338.

Where a carrier of live stock, in a suit for injury to such stock in transit, set up as a defense non-compliance by the shipper with the provision of the contract requiring notice of claims, and also that the weather had been such as to cause the delay in transit which caused the damage, such questions were triable by the common law as finally declared by the United States



ment it has been held that in case of interstate shipments coming within its terms, the initial carrier is made responsible for any "loss, damage or injury to the goods carried by it or by any common carrier, railroad or transportation company," not as absolute insurers, but to be fixed and determined according to the principles of general law applicable to common carriers, and as modified by statutes relevant to the subject.<sup>19</sup> Where under the law existing before the Carmack Amendment a shipper of live stock might recover under a verbal contract, he may thereafter recover under a verbal contract where no valid written contract was made; the amendment declaring that nothing should deprive the holder of any receipt or bill of lading of any remedy or right of action which he had under existing laws.<sup>20</sup>

**2. Connecting Carriers.** One important thing to remember is that the Carmack Amendment does not force a shipper to sue the initial carrier. In case of loss or injury the shipper may sue any carrier responsible for the damage.<sup>21</sup> The rule is that when a common carrier contracts to deliver goods at a certain place, all connecting carriers become agents of such contracting carrier, for whose negligence or default it is responsible.<sup>22</sup> The responsibility peculiar to a common carrier is not devolved on the next connecting carrier, until it has received the goods with directions for their shipment, the place of destination, and to whom consigned. Until this is done, the relation of com-

Supreme Court, since the Interstate Commerce Act makes no provisions on the subject of notice to the carrier of claims for damages and affords no relief on account of weather conditions, while superseding all state law on interstate shipments. *Cincinnati, N. O. & P. Ry. Co. v. Smith & Johnston* (Ky. 1915) 176 S. W. 1013.

19. *Brinson & Kramer v. Norfolk Southern R. Co.* (N. C. 1915) 86 S. E., 371, 372.

20. *Panhandle & S. F. Ry. Co. v. Jones* (Tex. 1916) 182 S. W. 1.

21. *Bichlmeier v. Minneapolis,*

*St. P. & S. S. M. Ry. Co.* (Wis. 1915), 150 N. W., 508, 509; *K. C. So. Ry. Co. v. Carl*, 227 U. S. 639, 648; *C. N. O. & T. P. Ry. Co. v. Rankin*, 36 Sup. Ct. 555, and see p. 124, *infra*.

22. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 55 L. Ed., 167, 31 Sup. Ct. Rep., 164; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *St. Louis Southwestern Railway Co. v. Elgin Condensed Milk Co.*, 175 Ill. 557, 51 N. E. 911, 67 Am. Rep. 238. *Fesser v. C. & I. M. Ry. Co.*, (Ill. 1915), 108 N. E., 709, 710.

mon carrier is not established between the shipper and the connecting carrier. To relieve the first carrier from further liability and charge the second carrier, it is necessary that the goods be delivered or properly tendered by the first carrier to the second.<sup>23</sup> But even though the intermediate carrier of a through line issues a new bill of lading, it nevertheless does not change the status as intermediate carrier and is not liable under the Carmack Amendment for default of any connecting carrier, but for its own negligence.<sup>24</sup> But, on the other hand it has been held that an "initial carrier" is the one contracting with the shipper and is not necessarily the one whose line constitutes the first link in

23. 6 Cyc. 486, 487. *Southern Ry. Co. v. Renes* (Ala. 1915), 68 So. 987, 989.

24. *Hudson v. Chicago, St. P., M. & O. Ry. Co.*, 226 Fed. 38, 40.

In *Looney v. Oregon Short Line R. Co.* (Ill. 1916) 111 N. E. 509, 510, the court said: "The amendment does not use the term 'initial carrier' nor 'primary carrier'; but the words employed refer to the initial carrier by designating such carrier as the one receiving property for an interstate shipment. The carrier made liable by the amendment has been treated by the courts continually as the initial or first carrier receiving the goods, and the purpose of the amendment has been declared to be to combine unity of responsibility with continuity of transportation. *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Alton Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 152 Wis.

156, 139 N. W. 743. The requirement that the carrier receiving property for a continuous interstate shipment shall issue to the shipper a receipt or bill of lading is confined to the initial carrier; and as there is no requirement that any connecting carriers shall issue a receipt or bill of lading it was evidently contemplated that the liability should attach to the first carrier only. In the case of *Hudson v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (D. C.) 226 Fed. 38, the court held that the liability attached only to the first carrier receiving property and was unable to assent to the conclusion reached by the Appellate Court in this case. We regard the reasoning of the court in that case as convincing. Any other doctrine would substitute diversity for unity, and instead of making liability depend upon the law would base it upon the independent, separate acts of connecting carriers. The liability imposed by the Carmack Amendment is a liability imposed only against the carrier first receiving goods for transportation."

transportation.<sup>24½</sup> However, the federal decisions govern this question, and hold the first carrier the "initial" carrier.<sup>25</sup> As has been shown, an intermediate carrier, even though it issues the bill of lading, is not liable as the initial carrier. In this connection a state court has held that under the provisions of the Carmack Amendment, the initial carrier alone is liable for damages to interstate shipments, and under the federal regulation of interstate commerce (which supersedes all state regulation upon the same subject) the remedy against the initial carrier is exclusive. But the Supreme Court of the United States has expressly held that any connecting carrier is liable for its own negligence.<sup>26</sup> But the better rule undoubtedly is that in spite of the Carmack Amendment the owner of a damaged shipment can sue the initial carrier alone or any one of the connecting carriers, or all jointly, for the damages.<sup>27</sup> The Carmack Amendment may be invoked by a shipper in a suit against a connecting carrier, although the declaration does not aver that any connecting carrier existed or show any facts to allow the Carmack Amendment to operate.<sup>28</sup>

It may be that, in general, a mere unreasonable failure of a connecting carrier to receive freight tendered from another road would be a breach of duty, having more the cast of a tortious wrong than a breach of contract. But, where a connecting carrier is not only in duty bound to receive goods so tendered, but holds itself out to the public for the performance of such service, and is designated by the initial carrier, in the contract of affreightment for a through rate, as the connecting line, and the latter assents thereto, by its custom of doing business, either by placing refusal to accept the freight upon some ground inconsistent with contractual obligations to do so, or by accept-

24½. A connecting carrier who agrees to heat a car is, as to default in heating in the course of the transportation, the initial carrier. *Ross v. M. C. R. R.* 112 M. E. 63, 90 Atl. 711, 713.

25. *Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co.* (N. Dak. 1916) 156 N. W. 1019, 1020; *Hudson v. C. St. P. M. & O. Ry.*, 226 Fed. 38, also

see *supra*, p. 5.

26. *Georgia F. & A. Ry. v. Blish Milling Co.*, 36 Sup. Ct. 541, 241 U. S., 190, 60 L. Ed.—.

27. *A. T. & S. F. Ry. Co. v. Boyce* (Tex.), 171 S. W. 1094, 1097.

28. *Norfolk Trucker's Exch. Inc. v. Norfolk Southern R. Co.*, (Va. 1914), 82 S. E. 92, 93.

ing it and demanding and receiving part of the through rate and then failing to complete its part of the transit, the wrong, distinctly, sounds in breach of contract. The holding out involves an offer to receive the subject of carriage and to convey the same over its line. The tender of the freight is an acceptance of the offer. The promise for a promise makes the mutuality of a contract. The actual acceptance of the property by the carrier pursuant to the designation in the agreement with the initial carrier makes the former a party, to all intents and purposes, to such agreement "bound by the obligations therein and benefitted by its limitations," which are valid.<sup>28 1/2</sup> That is the law, in general appertaining to a bill of lading covering a transit from the origin of the freight to a final delivery point for a through rate by a designated route, covering an initial and connecting carrier. Each line after the first which shall have, expressly, or by general course of business, authorized the initial carrier to make the contract, or which acts upon the designation in affirmance of the initial act, becomes a party thereto.<sup>29</sup> Therefore in spite of the Carmack Amendment, a connecting carrier is directly liable to a shipper for loss and damage to an interstate shipment.<sup>30</sup>

28 1/2. *N. & W. Ry. Co. v. Dixie Tobacco Co.*, 33 Sup. Ct. 609, 228 U. S. 593; 57 L. Ed. 980.

29. *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594, 601, 22 L. Ed. 724. *Berger Crittenden Co. v. C. M. & St. P. Ry. Co.* (Wis. 1915), 150 N. W. 496, 499, 500.

30. *Elliott v. C. M. & St. P. Ry. Co.* (Sd. Dak. 1915), 150 N. W. 777, 778.

The Carmack Amendment provides that nothing shall deprive any holder of any receipt or bill of lading, of any remedy or right of action he had under existing law. Under the existing federal laws, one making an interstate shipment might sue that railroad company whose negligence caused an injury. Held that, as the Car-

mack Amendment gave the initial carrier a right of action over against a negligent connecting carrier, a shipper might, in case of injury or loss, sue the negligent carrier and join the initial carrier. *Conley v. Chicago B. & Q. R. Co.* (Mo. 1916) 183 S. W. 1111.

Though the Carmack Amendment to the Interstate Commerce Act makes the initial carrier responsible for the negligence of all connecting carriers, it does not prevent liability from attaching to the intermediate or final carrier against whom a default can be established by proper evidence. *T. W. Mewborn & Co. v. Louisville & N. R. R.* (N. C. 1915) 87 S. E. 37.

A connecting carrier, guilty of

**3. Delivering Carrier.** As has been seen, under the Carmack Amendment the shipper is not restricted to sue the initial carrier alone. He may sue any intermediate or connecting carrier. The only requirement is that if he does so he must prove that the loss occurs on the line of such carrier and through its fault. It may therefore, be stated as the law, that the Carmack Amendment does not exempt from liability, expressly or by implication, the terminal carrier or any other. Hence if any connecting or terminal carrier actually damaged the shipment it is liable to the shipper for any injury it causes.<sup>31</sup> Suits against

negligently handling cattle received from the initial carrier, is liable for the injuries caused thereby, though the initial carrier was negligent in delaying the delivery of the cattle and prevented the connecting carrier in taking them out on its first train. *Andrews v. McGill* (Tex. 1915) 179 S. W. 1087.

A carrier receiving from another carrier cattle for shipment is liable for injuries to the cattle caused by placing them in pens without shelter and too small to accommodate them properly, and allowing them to remain therein for a day in the sun without food or water, though it may not be liable for not holding a train for the cattle. *Andrews v. McGill* (Tex. 1915) 179 S. W. 1087.

31. *Eastover Mule & Horse Co. v. A. C. L. R. Co.*, (S. Car.), 83 S. E. 599, 600; *A. C. L. R. v. Thomsville Live Stock Co.*, (Ga. 1913), 78 S. E. 1019.

In *Louisville & N. R. Co. v. Lynne* (Ala. 1916) 71 So. 338, the court said, p. 339, "The act of Congress known as the Carmack Amendment of the act of June 29, 1906 (Fed. St. Ann. Supp. 1909, pp. 273, 274); although it prescribes

and extends the liability of initial carriers of interstate shipments, does not abrogate nor in any way impair the separate liability of terminal or delivering carriers for losses occurring on their own lines, as fixed by the statutes or decisions of the several states. That act makes the initial carrier responsible for the safe delivery of shipments over connecting lines, no matter where the loss may occur, but it certainly does not exempt connecting lines from direct responsibility to the owner for their own failure to safely carry and deliver goods received by them for that purpose. This being the liability of the carrier in this case, the burden was on the shipper to show that his goods were lost or diverted while in the custody of the carrier. By showing the carrier's delivery to him of a part of the original shipment, a presumption arose of its receipt by the carrier in the same condition as when delivered to the initial or a preceding carrier, which imposed upon the carrier the burden of showing that missing goods were not lost while in its custody. *South Exp. Co. v. Saks*, 160 Ala. 621, 49 So., 392."

A terminal carrier is not re-

intermediate carriers are practically unknown and the reason for this is very apparent when the obligations of every class of carrier are analyzed. The initial carrier is sued because a statutory liability is imposed. Once it is proven that a shipment is delivered in good condition to the carrier and that the shipment was delivered at destination in a damaged condition, or not delivered at all, a *prima facie* case is immediately made out against the initial carrier. Where the delivering carrier is sued much the same facts will permit recovery. The presumption of the law is that the delivering carrier receives the goods in the same condition as its connecting carrier received them. If the goods are shown to be in good condition when delivered to the initial carrier, the presumption of the law is that they were in the same condition when delivered to the terminal carrier and hence any damage or loss is deemed to have occurred on the line of that carrier; and it should be noted that the Carmack Amendment has not modified the rule of law that a connecting carrier is presumed to have received the shipment in good condition and would not have received the shipment had the contents been in bad condition, without making some notation to that effect and protest. Therefore, where the shipper of live stock shows that the stock were in good condition when delivered to the initial carrier he can recover from the terminal carrier for damage. It is the business of the terminal carrier to prove that it did not cause it.<sup>32</sup> So where the delivering carrier is sued for injury to goods, the almost universal rule is that, in the absence of evidence locating the place of damage to goods in

lieved from liability for misdelivering an interstate shipment by the provisions of the Carmack Amendment, making the initial carrier liable for loss or damage occurring anywhere en route, with a remedy over against the carrier at fault, but the bill of lading which the initial carrier under that statute must issue governs the entire transportation, and thus fixes the obligations of all participating

carriers to the extent that the terms of the bill of lading are applicable and valid. *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.* 36 Sup. Ct. Rep. 541; 241 U. S. 190; 60 L. Ed., citing many U. S. Supreme Court cases *T. W. Mewborn & Co. v. Louisville & N. R. R.*, (N. C. 1915) 87 S. E. 37.

32. *Eastover Mule & Horse Co. v. A. C. L. R. Co. (S. Car.)*, 83 S. E. 599, 600.

transit over several connecting lines, a presumption arises, where goods are delivered to the initial carrier in good condition and are delivered by the terminal carrier in a damaged condition, that they were injured on the line of the last carrier, and the burden of proof is on the terminal carrier, when sued, to show that the damage was not done on its line, or, if done, that it occurred without its fault, or through the failure of the shipper to perform his contract.<sup>33</sup> The same general principles of evi-

33. *Central of Ga. Ry. Co. v. Chicago Varnish Co.*, 169 Ala. 287, 53 So., 832; *L. & N. R. Co. v. Jones*, 100 Ala. 265, 14 South. 114; *Central of Ga. Ry. Co. v. Strickland*, 4 Ala. App. 372, 58 So., 678, 7, 8.

*Midland Valley Ry. Co. v. Hale*, 6 Ark. 484, 111 S. W. 646; *St. L. I. M. & S. R. Co. v. Coolidge*, 72 Ark. 112, 83 S. W. 333, 67 L. R. A. 555; *St. Louis I. M. & S. R. Co. v. Hudgins Produce Co.* (Ark. 1915) 177 S. W., 400, 401.

Where containers were suitable and proper goods were delivered by the initial carrier to the terminal carrier in good condition, and on arrival at destination the goods were damaged and the containers leaking, the terminal carrier was liable. *United S. S. Co. v. Houston Packing Co.* (Tex. 1915) 177 S. W. 570.

Where goods are delivered in good condition to the initial carrier, and are found damaged, due to negligence, when delivered by the terminal carrier, and it is not shown which carrier was negligent, the presumption is that the last one was negligent. *Keithley v. Lusk* (Mo. 1915) 177 S. W. 756.

By showing the delivery by a carrier to a shipper of a part of the

original shipment, a presumption arises of its receipt by the carrier in the same condition as when delivered to the initial carrier, which imposes upon the carrier the burden of showing that missing goods were not lost while in its custody. *Louisville & N. R. Co. v. Lynne* (Ala. 1916) 71 So. 338, 339.

In an action against the terminal carrier for loss of goods, the burden is on the shipper to show that his goods were lost or diverted while in the carrier's custody. *Louisville & N. R. Co. v. Lynne* (Ala. 1916) 71 So. 338, 339.

Where a shipment was improperly handled by a terminal carrier and injury occurred while in its possession, it was liable without reference to a provision in its bill of lading exempting it from liability for injuries not occurring over its own line. *United S. S. Co. v. Houston Packing Co.* (Tex. 1915) 177 S. W. 570.

In suit against a terminal carrier for loss of goods, testimony of a checking clerk that at the point of delivery to the carrier the car was found short the goods complained of; Held insufficient to overcome a presumption that the missing goods came into the carrier's possession, where the clerk did not see the car opened. *Louisville &*

dence apply to damages occasioned by undue delay in the delivery of shipments, although the carrier is not, as is contended, an insurer against delay in transporting, as it is against the loss of the goods transported, except when such a loss results from the act of God, the public enemy, or the fault of the shipper. The carrier is only responsible, it is true, in cases of delay when that delay was occasioned by its negligence and not when not so occasioned, but under the conditions as before stated, a presumption of negligence arises against the carrier also in cases of delay, and, if it, (the carrier) would relieve itself of the presumption, it is incumbent upon it to prove that the delay resulted not from its negligence.<sup>34</sup> Under the rule that where goods are delivered to an initial carrier in good order and delivered by a terminal carrier in a damaged condition, a presumption arises that the shipment reached the terminal carrier in the same condition as when delivered to the initial carrier, and that the burden is upon the terminal carrier of meeting this presumption with evidence that the goods were not injured while in its possession, where a terminal carrier did adduce proof sufficient to overcome the presumption and showed that the damage was caused by delay occurring before the shipment was delivered to it, the presumption prevailed against the next preceding carrier and placed on it the burden of showing that the damage was not caused while in its hands.<sup>35</sup>

With practical uniformity courts recognize the rule that where freight, including live stock, is received by the initial carrier in good condition, and is delivered by the terminal carrier in a damaged condition, the presumption arises, the contrary not appearing, that such freight was delivered to such terminal carrier in the same condition as when received by the initial carrier; by reason of which presumption the burden is cast on such terminal carrier to show that the freight was not injured while in

N. R. Co. v. Lynne (Ala. 1916) 71 So. 338, 339.

34. 4 Ruling Case Law, 916, 917, Sec. 372; 6 Cyc. 442. L. & N. R. Co. v. Cheatwood, (Ala. 1915), 68 So. 720, 722.

35. St. Louis, I. M. & S. Ry. Co. v. Home Oil & Mfg. Co. (Ark. 1916)

183 S. W. 176; Eastover Mule & Horse Co. v. A. C. L. R. R. (S. C., 1914), 83 S. E. 599.



its possession.<sup>36</sup> However where the evidence discloses a proper handling and transportation while in a delivering carrier's possession, it plainly rebuts the presumption of negligence which ordinarily prevails against the delivering carrier when the shipment is shown to have been delivered to the initial carrier in good condition and reaches the end of its journey in a damaged state.<sup>37</sup> But the principle that the delivering carrier is presumed to be responsible for damage caused to livestock does not apply to a case where the shipper accompanied the cattle and is in as good a position as the carrier to know the cause of injuries.<sup>38</sup> And in an action for loss and damage the delivering carrier is liable only for the loss which it causes.<sup>39</sup> But that passage is sold over a receiving and connecting line does not show such a relation between the lines as to render the terminal line *prima facie* liable for any breach of contract or duty on the part of the receiving line.<sup>40</sup> And it should be noted that a right of action against an intermediate or terminal connecting carrier, in an interstate shipment, for loss of property in transit resulting from its negligence is assignable; and where, as a result of such loss, the property does not exist, and where the bill of lading embracing the same has been surrendered to the carrier by the shipper in order to obtain delivery to him of other property embraced in such bill, the assignee may sue in his own name upon such right of action without showing that he is the actual holder of such bill.<sup>41</sup> Also, a carrier may deliver goods to a drayman in the habit of receiving goods for that particular consignee and if it does so is not guilty of misdelivery.<sup>42</sup>

36. Wallingford v. Columbia Co., 26 S. C. 258, 2 S. E. 19; Shea v. Chicago, etc., Co., 66 Minn. 102, 68 N. W. 608; Texas, etc., Co. v. O'Laughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104; Nashville, C. & St. L. Ry. Co. v. Johnson (Ind. 1915), 109 N. E. 912, 915, 916.

37. G. H. & S. A. Ry. Co. v. Patterson (Tex. 1915), 173 S. W. 273, 274.

38. San Antonio, U. & G. Ry.

Co. v. Storey (Tex. 1914), 172 S. W. 188.

39. Trakas v. Southern Ry. Co. (S. C. 1915), 86 S. E., 492.

40. M. & W. P. Southern Ry. Co. v. Renes (Ala. 1915) 68 So. 987, 989.

41. St. L. & S. F. R. Co. v. Mounts (Okla.), 144 Pac. 1036, 1037.

42. Kinston Cotton Mills v. Atlantic Coast Line R. Co. (N. C. 1915) 86 S. E., 633.

## VI.

### ACTS RELIEVING CARRIER OF LIABILITY

1. In General.
2. Fault of Shipper.
3. Inherent Character of Shipments.
4. Act of God.
5. Operation of Law.

1. **In General.** As has been seen, a carrier of goods is practically an insurer against all losses save those arising from act of God, public enemy, duly constituted authority, or the inherent character of the goods shipped.<sup>1</sup> But in an action against a carrier for damage to or loss of goods in transit, the burden is on the carrier to bring itself within one of the exceptions to its liability as an insurer.<sup>2</sup>

2. **Fault of Shipper.** One cause which relieves the carrier from liability for loss providing it has been free from negligence, is the negligence of the shipper in loading and packing the goods.

1. St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co., (Ark. 1915) 177 S. W., 400. The court said, p. 401:

"A common carrier is practically an insurer of all goods received by it for shipment against all losses except those relating to, or which arise from, the act of God, of the public enemy, of constituted authority, of the shipper, or from the inherent nature of the goods shipped, and in all cases in which loss occurs, not falling within said recognized exceptions, the carrier

is responsible notwithstanding there may be no negligence or fault upon its part. Its liability springs from the duty imposed upon it to carry safely, and the law making it responsible as an insurer for the losses occurring from any and every cause, other than one falling within the specified exceptions. St. L. I. M. & S. R. Co. v. Pape, 100 Ark. 269, 140 S. W. 265; Brennisen v. Pa. Ry. Co., 100 Minn. 102, 110 N. W. 362, 10 Ann. Cas. 169."

2. Perry v. Seaboard Air Line R. Co. (N. C. 1916) 88 S. E. 156, 157.

In a typical case of a shipment of live stock it appeared plaintiff loaded a mixed car of live stock at Leitchfield, Ky., in three separate compartments; in one end of the car, some calves and sheep; in the other end, eight head of cattle; and in the middle and separated by partitions at either end, a lot of hogs. It was further shown that on arrival of the car at Louisville, two hogs were dead, one cow crippled, and three or four others somewhat injured. The duty of doing the loading was assumed by the shippers; they loaded the car themselves without assistance of any of the carrier's agents; and the agent at Leitchfield did not examine the car after it was loaded. It was shown by the crew of the train which handled the car that at Kroft's station, some 25 miles from Leitchfield, they discovered that there was something wrong in the car, and made an investigation which disclosed that one hog was dead and another badly injured; one cow was down and three or four others injured; that about 15 hogs were in the same compartment with the cattle; that they must have been loaded that way, as the partition between the cattle and the remainder of the hogs was intact. The trainmen knocked this partition out, thus allowing all the hogs to be in the same compartment with the cattle. Held, that where the carrier furnishes a car to the shipper for the purpose of shipping live stock therein, and the latter loads the live stock himself, and in doing so he over-crowds the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, being caused by his own act, or by his own act in conjunction with the inherent nature, propensities, and qualities of the animals themselves; the carrier not being liable for loss or injury due to either or both of such causes.<sup>3</sup> A shipper of fat cattle to the Chicago market instructed the billing clerk of the carrier to route the shipment via East St. Louis, so that he could make an attempt to sell them at the National Stock Yards. The clerk made out the billing for a

3. I. C. R. Co. v. Rogers & Thomas (Ky. 1915), 172 S. W. 348.

Where a shipper takes charge of the loading of potatoes, the carrier is not liable for injuries from

freezing, caused by the shipper's negligence. St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co. (Ark. 1915) 177 S. W., 400.

through shipment to Chicago. The shipper signed the contract without looking at it and subsequently brought suit for damages for negligence for failure to comply with the oral contract to carry via East St. Louis. Held, if the plaintiff was entitled at all to maintain his action, his suit should have been for reformation of the stock contract joined with a suit for damages. However, he was negligent himself in signing the contract without examining it, and, therefore, could maintain no action for damages due to the transportation of the cattle direct to Chicago.<sup>4</sup> Generally the shipper of live stock has a caretaker accompany the shipment, whose duty it is to look after it. On this account it has been held that the duty of properly caring for the stock in transit has been transferred from the carrier to the shipper. So where a shipper of live stock agrees to load and unload the same and to take care of them in transit and is carried free for that purpose, it is the duty of such shipper to see that the live stock receives sufficient ventilation and other care en route and the carrier is not liable if the stock suffers from lack of care.<sup>5</sup> A common carrier is, at common law, an insurer of goods shipped, except for damages arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault of the shipper was the sole cause of the loss.<sup>6</sup> However, if improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment, knowing it to be defectively packed, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches.<sup>7</sup> Although the carrier has knowledge of defective packing, yet if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take

4. *Spelman v. Delano* (Mo. 1915) 172 S. W. 1163.

5. *Hanner v. Fargo*, 151 N. Y. Supp. 913.

6. *Northwestern Marble & Tile*

*Co. v. Williams* (Minn. 1915), 151 N. W. 419.

7. *Northwestern Marble & Tile Co. v. Williams* (Minn. 1915), 151

N. W. 419.

the chances of injury from improper packing. On this point the evidence presents a question for the jury.<sup>8</sup> But the agreement that a shipper should care for animals in transit is no defense to an action for damages to the same, unless the railroad company shows adequate facilities were provided, and the agreement was reasonable.<sup>9</sup> And the negligence of the carrier should not contribute to the injury. Thus where the injury to a shipment of mules by rail was caused by the evil and vicious propensities of the animals, incited and caused to be exercised by the carrier's negligence in failing to sand the floor of the car, leaving it smooth and slippery, causing them to fall, kick, and bite one another, the road was liable for the resulting damage.<sup>10</sup>

**3. Inherent Character of Shipments.** While common carriers of property are insurers, in the absence of a contract limiting their liability, they are such insurers only in a qualified sense. Thus they are not insurers against injury resulting from the act of God or a public enemy, or from the inherent nature of the thing carried. Thus they are not insurers that fruit carried will not decay, or that liquids will not evaporate, or that animals carried will not inflict injuries on themselves or their fellows, thru their natural disposition to be frightened, or to crowd, kick, hook, etc., nor, in the absence of negligence, are they liable for damages resulting therefrom. Subject to such limitations or exceptions, common carrier, in the absence of a contract as aforesaid, are insurers of the property carried by them.<sup>11</sup> In other words the obligation of the carrier to

8. *Northwestern Marble & Tile Co. v. Williams* (Minn. 1915), 151 N. W. 419.

9. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361.

10. *Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.* (Mo. 1915) 180 S. W. 412.

11. *Swiney v. Am. Co.*, 144 Iowa, 342, 115 N. W. 212, 122 N. W. 957;

*Mo. Pac. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Church v. Chicago, etc., Co.*, 81 Neb. 615, 116 N. W. 520; *Coupland v. Housatonic Co.*, 51 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; 5 *Thompson on Negligence*, sec. 6471; *Cleveland, etc., Co. v. Schaefer*, *supra*; *Stiles v. Louisville, etc., Co.*, 18 L. R. A. (N. S.) 86, note. *Nashville, C. & St. L. Ry. Co. v. Johnson*, (Ind. 1915), 109 N. E. 912, 916; *C. R. I. & P.*

deliver in good condition is limited by taking into consideration the perils of the road and the natural propensities of the animals

Ry. v. Scott (Tex. 1912), 156 S. W., 298.

St. Louis Southwestern Ry. Co of Texas v. Kerr (Tex. 1916) 184 S. W. 1058.

In Hutchinson on Carriers, 1st Ed. p. 343, Sec. 336 the rule is laid down as follows:

"The liability of the common carrier of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation, or they may die from heat or cold. In all cases, therefore, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, the carrier is relieved from responsibility if he can show that he has provided all suitable means of trans-

portation, and exercised that degree of care which the nature of the property requires."

To the same effect, see the following cases.

Texas Etc. R. Co. v. Hunter, 47 Tex. Civ. App. 190.

M. P. Ry. Co. v. Harris, 67 Tex. 166.

Gulf Etc. R. Co. v. Trawick, 68 Tex. 314.

M. P. R. R. Co. v. Fagan, 72 Tex. 127.

G. Etc. R. Co. v. Baird, 75 Tex. 256.

Tex. Etc. Ry. v. Hunter, 47 Tex. Civ. App. 190.

Ft. Worth Etc. R. Co. v. Nat'l Bank, 81 S. W. 1050; 98 Tex. 616.

I. & G. R. R. v. Young (Tex.) 72 S. W., 68.

Winslow v. C. & A. R. Co. (Mo. 1913) 157 S. W. 96.

Summerlin v. Seaboard Air Line Ry. (Fla. 1908) 47 So. 557.

Quinby v. Union Pac. R. Co. (Neb. 1909) 120 N. W. 453.

Webster v. U. P. R. Co., (Colo. 1912) 200 Fed. 597.

McC Campbell, Figg & Burnett v. L. & N. R. Co. (Ky. 1912) 150 S. W. 987.

Foust v. Lee (Mo. 1909) 119 S. W. 505.

Harden v. C. & O. Ry. Co. (N. C. 1911) 72 S. E. 1042.

Adams Express Co. v. Scott (Va. 1912) 73 S. E. 450.

Green v. C. M. & St. P. Ry. Co. (Mo. 1910) 137 S. W. 611.

G. H. & S. Ry. Co. v. Jones (Tex. 1910) 123 S. W. 737.

themselves, and if, considering these, it fails to deliver them in the condition received, it is responsible for damages, unless these

St. L. & S. F. R. Co. v. Franklin  
(Tex. 1909) 123 S. W. 1150.

Weaver v. So. Ry. Co. (Ga.  
1912) 75 S. E. 447.

So, where stock is received for shipment, it is only the duty of the carrier in shipping the same to furnish suitable and adequate accommodations.

M. Pac. R. R. v. Kingsbury,  
(Tex. Civ. App.) 25 S. W. 322.

For instance, if the shipper is satisfied with bedding which is furnished, no recovery can be had if the stock injure themselves by rubbing themselves against the side of the car.

Tex. Cent. R. R. Co. v. O'Laughlin  
(Tex. Civ. App.) 72 S. W. 610.

Where the injury is due in whole or in part to the fault of the shipper, the carrier is not liable.

Tex. Etc. R. v. Edins, 36 Tex.  
Civ. App. 639.

Tex. C. R. v. O'Laughlin, 72 S.  
W. 610.

Ft. Worth & D. C. Ry. Co. v.  
Wood, 32 S. W. 14 (Tex.)

But in all cases, the question as to whether the shipper is negligent is one for the jury.

M. P. Ry. Co., v. Edwards, 78  
Tex. 307, 313.

Gulf Etc. Ry. Co. v. Talliaferro,  
40 Tex. Civ. App., 388.

Where live stock is injured in transit by trampling, biting, or kicking each other, the carrier is not liable for such injury, the risk of which the shipper assumed.

Schloss-Bear-Davis Co. v. Louisville & N. R. Co. (N. C. 1916) 88 S. E. 476.

Where the proximate cause of the death of a mare in transit was a kick from another horse while in the shipping pens, not brought about by any negligence of the railroad's servants, and not followed by any negligence of the road in the further transportation of the mare, proximately contributing to her death, the road was not liable therefor, since in shipments of live stock the carrier is not liable for injury arising only from the inherent nature or vicious disposition of the animal. Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co. (Tex. 1915) 180 S. W. 1170.

Where a mare was seriously injured either in the cars or by being kicked by another mare in the shipping pens, and the shipper's agent had knowledge of the fact, and knew, or might have known by the exercise of due care, the danger of further transporting such mare, and declined to unload her and to take such reasonable precautions as might have resulted in her recovery, taking a chance on it, and the further transportation, unaccompanied by any negligence on the part of the railroad's servants, resulted in the mare's death, the road was not liable. Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co. (Tex. 1915) 180 S. W. 1170, 1171.

Where the agent of the shipper of a mare, after discovering the

were occasioned by the neglect of the shipper or his agent.<sup>12</sup> And the burden is upon the carrier to show that the damage was

animal's injured condition in the cars, directed that she be shipped on through and not removed from the train, which was negligence on his part proximately contributing to such mare's death, the shipper could not recover therefor from the railroad, although its servants were also negligent in the further transportation, since after the discovery of an injury, even if wrongfully occasioned, the duty rests upon the owner of the injured property to exercise reasonable care to save it or lessen the injury. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.* (Tex. 1915) 180 S. W. 1170, 1171.

It is not necessary for a carrier to specially plead the defense of injury from the inherent propensities of the animals, but proof thereof would be admissible under its general denial of the negligence charged against it, unless it could be said that the evidence showed some inherent vice in the particular cattle not common to cattle generally. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Tex. 1916) 184 S. W. 1058.

<sup>12</sup> *Golsch v. Chicago, M. & St. P. Ry. Co.*, (Iowa 1915), 153 N. W. 327, 328.

A carrier of live stock is not an insurer, as in the case of inanimate freight, and may escape liability for injuries resulting from an act of God, public enemy, fault of the shipper, or the inherent vice of the animals. *Botts v. St. Louis & H. Ry. Co.* (Mo. 1915) 177 S. W. 746.

The carrier is not liable for injuries caused through the natural propensities of the animals, but this does not relieve it from liability for damage due to delay or the like. *Michie on Carriers*, page 1341, lays down the rule as follows: Sec. 1848:

"That a carrier may avoid liability for injuries to horses during transportation on the ground of their vices and natural propensities, it must appear that the injuries occurred by reason of such vices and natural propensities alone, or in conjunction with some innocent cause, and the burden is upon the carrier to prove that fact. \* \* \*

Where the carrier carries the animals without any negligence on its part, there can be no liability for injuries where the vicious propensities or inherent bad condition of animals give rise to the damage in transit, without any fault of the carrier, but where there is evidence to show that cattle were subjected to great delay, and not properly treated en route, and even those not mares suffered injury therefrom, the carrier cannot say that it is relieved from certain damages in respect to the mares because they were predisposed to injury from its negligence. Nor can it claim that the injuries to such mares were not such as should have been reasonably anticipated as the effect of negligent treatment."

*Hutchinson on Carriers* (3rd ed.)



due solely to inherent defects in the shipment. It would not be enough for the carrier to show that the damage was caused partly by the inherent quality of the article; for, if it was due only partly to the carrier's negligence, it would be liable.<sup>13</sup> So where under the evidence the injury to a shipment could have been caused by the negligence of the carrier or the inherent nature of the goods, a verdict of the jury that it was caused by the negligence of the carrier will not be disturbed.<sup>14</sup> Injury from inherent qualities is somewhat in the nature of damages resulting from the act of God; and in the more recent development of the rules as to liability of carriers it has been held that they are not liable for loss or damage due to the intrinsic qualities of the goods carried.<sup>15</sup> When the goods composing a shipment are of

further explains the rule as follows: Sec. 342.

"But while it is always competent for the carrier to show in his defense that the injury resulted from the peculiar nature or inherent vices of the animals themselves and thus excuse himself from liability, if it appears that he has been guilty of any negligence and that such negligence contributed to the injury, the excuse can no longer avail him. It is his duty to exercise at all times ordinary care in guarding the stock against such injuries as are likely to result from their natural propensities and which, in view of the character of the animals, can reasonably be foreseen and provided against; and for a failure to do so whereby the animals cause themselves injury, he will be liable. This in the case of *Loeser v. The Railway*, 94 Wis. 571 it appeared that the defendant's servants unloaded a number of horses from the car in which

they were being transported and drove them in a group into a yard, where they were to be tied. Before all the horses were tied, two of the number began to kick and one of them, by its own act of kicking dislocated its leg at the hock, necessitating its being killed. The jury found that the manner of driving the horses loosely in a body instead of separately was, under the circumstances, a negligent act, and returned a verdict against the defendant. On appeal judgment on the verdict was affirmed, the court saying that ordinary care might well have required in such a case that vigilance be used to guard against and restrain the natural propensities of the animals to cause themselves injury."

13. *Capital City Oil Co. v. Central of Georgia Ry. Co.*, (Ga. 1915), 86 S. E. 57, 59.

14. *Karr v. Baltimore & O. R. Co.*, (W. V. 1915), 86 S. E. 43.

15. *Ohlen v. A. & W. P. R. R. Co.*, 2 Ga. App. 328, 58 S. E. 511. See,

such intrinsic character as to be self-destructive, or incapable of safe transportation, the presumption that damage which accrues in the course of the transportation was due to the negligence of the carrier is rebutted by showing that the damage was due to the inherent qualities of the shipment. But, the burden in such a case would be upon the carrier to prove, by satisfactory evidence: (1) that the shipment had an inherent defect or vice which ultimately caused the loss or damage to it in transit; and (2) that negligence of the railway company, or its agents or employes, or of connecting carriers, did not contribute to such loss or damage.<sup>16</sup>

**4 Act of God.** It is elementary that a common carrier is bound to use extraordinary diligence, and that, in case of loss, the law is against him, and no excuse avails, unless it was occasioned by the act of God or the public enemy of the state. It is equally well settled that, for a carrier to avail himself of the defense that loss or damage was caused by the act of God, he must establish, not only that the act of God occasioned the loss, but also that his negligence did not contribute to it.<sup>17</sup> So where a carrier is sued for loss or destruction of goods in transit, resulting from unreasonable delay in delivery, the defense that the delay was caused by an unprecedented flood or some other act of God will not avail, where it appears that the delay was attributable, not merely to this cause, but largely to the negligence of the carrier.<sup>18</sup> In a strong case recently decided it appeared in an action for the destruction of household goods by a flood, while the flood referred to was perhaps the greatest that had occurred in more than a quarter of a century, it was not the greatest in the history of the stream because there was testimony to show that a greater flood occurred about the year 1852. Held, that the jury was justified in finding that the flood in question was not such an unprecedented and extraordinary flood as the carrier

also, *Forrester v. Georgia Railroad, etc., Co.*, 92 Ga. 699, 704, 19 S. E. 811.

16. *Capital City Oil Co. v. Central of Georgia Ry. Co.* (Ga. 1915), 86 S. E. 57, 58, 59.

17. *Capital City Oil Co. v. Central of Georgia Ry. Co.*, (Ga. 1915), 86 S. E. 57, 58.

18. *Lamb v. W. H. Mitchell & Co.*, (Ga. 1915), 84 S. E. 213.

was not required to anticipate and guard against.<sup>19</sup> So in an action for damages to a shipment destroyed by a flood, it is competent for the claimant to prove that the flood was a matter of common knowledge and that all the persons in the vicinity knew from telephone messages, reports in daily papers and telegrams that the flood was approaching, in order to refute the contention of the railroad that it was unexpected and an act of God.<sup>20</sup> And hearsay evidence is admissible to show the history of a stream in order to prove that a flood which had destroyed certain shipments was not unprecedented.<sup>21</sup> In a typical case it appeared an unusual freshet, continuing for some days, caused by the heavy rains within the watershed, raised the water of the Hudson river to an unprecedented height. The "peak" of the flood was between noon and 1 o'clock in the afternoon on the 28th of March, at which time the water was about five feet higher than the highest previous record. At Troy, prior to 1 o'clock on the 27th, the water raised one-tenth of a foot an hour, and it fell with the same degree of fall. At this rate of advancement, 24 hours prior to noon on the 28th the water must have been about 22-5-ft. lower than it was at the peak, which would make the flood at noon on the 27th about 2 3-5 ft. higher than any previous flood. A car shipment for the injury of which suit was brought left Rensselaer at 10:27 a. m. on the 27th, and arrived at Troy, about noon of that day. The carrier placed the car in immediate proximity to a car of unslaked lime, when it knew that the water was higher than it ever had been known to be before and was still rising. It therefore owed the shipper an active duty to use reasonable care not to expose his property unnecessarily. It knew, or was chargeable with knowledge, that if water reached the unslaked lime a fire would naturally result. It knew or should have known the contents of the car containing the lime. It is true that the unusual height of the water caused the car containing the lime to

19. *International & G. N. Ry. W. 970, 971.*

*Co. v. Penney, (Tex. 1915), 178 S. W. 970, 971.*

20. *International & G. N. Ry. Co. v. Penney, (Texas 1915), 178 S.*

21. *International G. N. Ry. Co. v. Penny, (Tex. 1915), 178 S. W.*

*970, 971.*

burn, but, if the car containing the claimant's goods had been properly placed, the burning of that car would have caused him no injury. The loss, as a proximate cause, was due to the fact that the carrier negligently placed the goods next to the car of lime. The question for the jury was whether, under all the circumstances, the placing of the car was a negligent act on the part of the carrier, which was the proximate cause of the loss.<sup>22</sup> And a strike, accompanied with violence and intimidation, may be treated as an "Act of God," so far as it may cause delay on the part of a carrier in transporting goods.<sup>23</sup> A carrier of live stock is not liable for injuries caused by changing weather conditions.<sup>24</sup> But if the negligence of the carrier concurs with the act of God in producing the injury, it is still required to answer therefor.<sup>25</sup> So where goods are lost or injured as a result of the negligent act of the carrier, to whom they have been delivered for transportation, concurring with an act of God, the carrier cannot maintain that the act of God was the sole proximate cause of the loss of or injury to the goods so as to relieve it from liability.<sup>26</sup> And negligence of the shipper concurring with an act of God in the destruction of goods delivered to a carrier for transportation constitutes no defense by the carrier to an action brought against it by the shipper for damages for the loss of the goods, where the

22. *Barnett v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 374, 376.

23. *Southern Cotton Oil Co. v. L. & N. R. Co.*, (Ga. 1915), 84 S. E. 198, 199.

24. *Washington Horse Exchange v. Louisville & N. R. Co.* (N. C. 1916) 87 S. E. 941.

25. *St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co.* (Ark. 1915) 177 S. W. 400, 401; *Vail v. Railway Co.*, 63 Mo. 230; 6 Cyc. 381; *White v. Railway Co.*, 111 Minn. 167, 126 N. W. 533. In the last cited case the court said: "A carrier is not an insurer against

damages to freight from changes in temperature, unless the circumstances in which the transportation is undertaken impose upon the carrier that obligation; but if, after acceptance of the freight, its transportation is delayed, the carrier must use reasonable care to protect it during the delay."

A carrier is liable for injury to goods caused by act of God if its negligence concurs in producing the injuries. *St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co.* (Ark. 1915) 177 S. W. 400, 401.

26. *Gulf Coast Transp. Co. v. Howell* (Fla. 1915) 70 So., 567.

carrier is also guilty of negligence which, concurring with the act of God, resulted in the loss of the goods.<sup>27</sup>

5. **Operation of Law.** Under the Harter Act water carriers are exempted from liability in certain specified instances and under certain specified conditions. It has been recently held, therefore, that the initial carrier is not liable under the Carmack Amendment for loss which occurs while the goods are in the possession of the connecting water carrier, which under the Federal Statutes governing such carriers is exempted from liability. That is, defenses which under the laws of the United States are specifically applicable to water carriers may be made available in a state court in an action against an initial rail carrier for damage caused by its connecting water carrier.<sup>28</sup>

From a perusal of the language of the Carmack Amendment, making the initial carrier responsible for injuries caused by it or by any connecting carrier, and from the provision also contained in the amendment for repayment of the initial carrier

27. *Gulf Coast Transp. Co. v. Howell* (Fla. 1915), 70 So. 567.

23. *Brinson & Kramer v. Norfolk Southern R. Co.*, (N. C. 1915), 86 S. E. 371, 373.

Defenses existing under Act Cong. Feb. 13, 1893, c. 105 (U. S. Comp. St. 1913, §§8029-8035), relieving the owner of a vessel of responsibility under certain conditions by reason of faulty navigation, and Rev. St. U. S. §4283 (U. S. Comp. St. 1913, §8021) by which the liability of the owner is restricted to the value of his interest in the vessel and its freight then pending, for loss or injury by collision, occasioned without the privity or knowledge of such owner, are available to a carrier sued in a state court having cognizance and jurisdiction of the cause. *Brinson & Kramer v. Norfolk Southern R. Co.* (N. C. 1915) 86 S. E. 371.

Act. Cong. Feb. 13, 1893, c. 105, §3, 27 Stat. 445 (U. S. Comp. St. 1913, §8031), provides that if the owner of any vessel shall exercise due diligence to make it seaworthy and properly manned and equipped, neither the vessel nor the owners shall be responsible for damage or loss resulting from faults or errors in navigation or arising from dangers of the sea or other navigable waters, acts of God, etc. Held, that where a violent hurricane loosened a porthole and forced sea water upon the cargo, a finding in favor of the steamship company in an action for damages involved the finding that the damage was unavoidable through an act of God, and precluded a recovery against a connecting railway carrier which was guilty of no negligence. *Texas & P. Ry. Co. v. Erambert* (Tex 1916) 184 S. W. 274.

by any other or connecting carrier actually causing the loss, etc., although the initial carrier may be by rail, if any connecting company along the designated or usual route of shipment, there being no route designated, is a carrier by water, and the loss or injury occurs by the wrong of such company, the initial carrier may avail itself of the federal legislation applicable to transportation companies of that character, limiting the amount of recovery in certain instances, and at times relieving of responsibility altogether; the principle being that, in cases coming within the effects of the law, the initial carrier, so far as the shipper is concerned, is held to have contracted for through transportation, and is liable for the default of itself or any connecting carrier, and may avail itself of any defenses or of limitations of liability open to the carrier causing the loss.<sup>29</sup> So in an action against an initial rail carrier for loss of goods at sea while on a connecting water carrier, the railroad can set up any defense which by the federal statutes the boat line could have set up in a similar action.<sup>30</sup> And a water line which is not under a common control, management or arrangement for a continuous carriage or shipment with a railroad company is not liable for damage to a shipment of goods delivered to it as an initial carrier and damaged on the line of a connecting rail carrier, under a bill of lading which restricted liability to its own line.<sup>31</sup> The strict rule of the common law whereby a carrier could not escape liability for failure to deliver goods received for carriage, except by showing that such failure was caused by the act of God or the public enemy, has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, without any fraud, collusion, or consent on its part, by an officer of the law acting under authority apparently valid on its face, and when it notifies the consignor of such seizure.<sup>32</sup>

29. *Brinson & Kramer v. Norfolk Southern R. Co.*, (N. C. 1915), 86 S. E. 371, 372.

30. *Brinson & Kramer v. Norfolk Southern R. Co.*, (N. C. 1915), 86 S. E. 371, 373.

31. *Levy v. Old Dominion S. S. Co.*, (N. Y. 1915), 154 N. Y. S., 227,

228.

32. *Danciger v. Atchison, T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800.

Under Act Cong. March 1, 1907, c. 34 Stat. 1017, giving the special agent of the Indian Bureau for the suppression of liquor traffic among

Indians and in the Indian country, and his deputies, the powers conferred on Indian agents and the commanding officers of military posts by Rev. St. U. S. §2140, providing that, if an Indian agent has reason to suspect or is informed that any white person is about to introduce any spirituous liquor into the Indian country in violation of law, he may search such persons's place of deposit, and shall seize any liquor found and deliver it to the proper officer, to be proceeded against by libel and forfeited, an Indian officer who suspected that intoxicating liquor in the wareroom of a carrier's station in Kansas, about half a mile from the "Indian country" in Oklahoma, was consigned to parties in the Indian country, had a right to seize it and take it from the carrier's possession. *Danciger v. Atchison T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800, 801.

And in such case the carrier's agent was not required to resist the officer's taking and attempt to decide the question of law himself, since the officer's apparent authority to take the liquor was the highest form of vis major; and, at any rate, his failure to resist could not be taken a consent to the taking. *Danciger v. Atchison, T. & S. F. Ry. Co.* (Mo. 1915) 179, S. W. 800, 801.

And where an officer of the United States Indian Service engaged in the suppression of the

liquor traffic took intoxicating liquors from defendant's possession at its station in Kansas, near the "Indian country" in Oklahoma, the carrier could not be held liable to the shipper for its loss, where the officer had authority to seize the goods, even though he thereafter destroyed them, since his act in destroying them was his own act, with which the carrier had nothing to do. *Danciger v. Atchison, T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800.

Where the consignees of shipments of intoxicating liquor which arrived at defendant's station at C. on August 21st, and 22d did not live at C., the reasonable time allowed the consignees before liability as carrier ceased had not elapsed when a federal officer seized the liquor on August 22d and 23d. *Danciger v. Atchison, T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800.

Where an officer of the United States Indian Service, under the statute and his commission, had apparent authority to take from a carrier's possession liquors which he suspected were to be introduced into the Indian territory, the carrier, as against the consignor suing for their loss, was not bound to construe the statute, nor foresee a subsequent ruling that the officer had no real authority to act outside his territory. *Danciger v. Atchison, T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 800, 801.

## **VII.**

### **FILING OF CLAIM**

- 1. Notice of Loss.**
- 2. Party to Whom Notice Should be Given.**
- 3. Manner of Giving Notice.**
- 4. Form of Notice.**
- 5. Waiver.**

**1. Notice of Loss.** No part of the law of carriers has caused more discomfort to shippers than the provisions in the various bills of lading barring the shipper's right to recover unless notice of loss is given within a specified time. The bills of lading of the different carriers, particularly the livestock contracts, are not uniform on this point. Some contain a provision requiring notice within one day, others a longer period. The Cummins Amendment to the Interstate Commerce Act, in effect June 2, 1915, contains the following provision:

"That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

As has already been stated, the necessity of giving notice is entirely obviated if the damage is due to the negligence of the carrier. Since practically all suits brought are due to negligence it is very evident that in the majority of instances the giving of notice may be a useless formality. However, it would not be wise to dispense with this formality until the Federal Courts have given a definite construction to this provision. This pro-



viso, that the limitation does not apply to cases of negligence, is in line with what has previously been the law in the state of New York. There it has been held that a four-month's limitation in a bill of lading does not bar claims for negligence.<sup>1</sup> This was on the theory that it would be manifestly unjust to permit a carrier to make a contract for an intrastate shipment to be construed by the courts in accordance with the laws of the state, and then by its own default and wrong to convert such a contract into a contract involving an interstate shipment to be construed and its validity to be determined by the courts in accordance with the law as pronounced by the federal courts.<sup>2</sup> In this case it was held that a provision in a bill of lading that claims for loss or damage must be made within a specified time is entirely destroyed and rendered invalid by the carrier deviating from the route specified therein, and in such a case, the carrier, having broken in a material part one of the covenants in an express contract to be performed on its part, cannot in reason or justice call upon a shipper to perform his covenants contained in the same contract.<sup>3</sup> Now it should be noted that while the Cummins Amendment makes it unlawful for the carrier to fix a period for giving notice of claims shorter than 90 days, for the filing of claims shorter than four months, and for the institution of suits shorter than two years, the law does not indicate the time or date from which these several periods of time shall be computed; that is, whether from the date of delivery by the carrier of the damaged property, or in case of loss, after a reasonable time for delivery has elapsed, from the date shown on the bill of lading, or from the occurrence of the loss or of the damage. It seems clear that these provisions are, in common with the other matters governed by the amendment, confined to instances of loss, damage, or injury caused by the carriers. It will be necessary for the carriers to determine what periods of time they will fix for the giving notice of claims, the filing of claims, and the institution of suits. The dates or times from which such periods shall run should also be fixed in the rules. In the interest of thorough understanding and to avoid contro-

1. *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 633, 638.  
*Co.*, 153 N. Y. S., 633, 638.

3. *Lynch v. N. Y. C. & H. R. R.*

2. *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 633, 637.

versies it is very desirable that these rules be uniform for all the carriers of the country.<sup>4</sup> A provision in a live stock contract providing for notice within a specified time does not constitute a restriction upon the liability of the carrier, but is established merely as a reasonable regulation for the government of the parties in performing the contract and in enforcing their rights thereunder.<sup>5</sup> In that respect those stipulations are unlike one which contains a contract for a reduction of the amount to be recovered, or the degree of care, or one, in fact, which affects in any other particular the liability of the carrier; but, the validity of such regulations as this depends upon their reasonableness, and not upon the question whether or not there is a consideration therefor, inasmuch as the stipulations are founded upon the considerations of the contract of shipment.<sup>6</sup> The object of requiring notice of the place and nature of the injuries is to give the carrier an opportunity for a full and fair investigation of such injuries when and where it will be most certain, easy, and expeditious. The notice is required to be in writing, so that the nature of the shipper's grievance may be definitely and clearly stated.<sup>7</sup> Since carriers will undoubtedly incorporate provisions in the bill of lading in line with the Cummins Amendment, and will provide for the limitations authorized by that law, it behooves the shipper to note that he is not relieved from the obligation of using diligence to present his claim. A shipper suing a carrier for loss or damage to a shipment has the burden of proving that he presented his claim to the carrier with the

4. The Cummins Amendment, 33 I. C. C. 682, 691.

5. *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254; *M. & N. A. R. Co. v. Ward*, 111 Ark. 102, 163 S. W. 164.

6. *St. Louis Southwestern Ry. Co. v. I. W. Haynie & Co.*, (Ark. 1915), 179 S. W. 170, 171, 172.

A carrier of live stock may by stipulation provide that notice of any claim for loss or damage be given by the shipper within a reasonable and prescribed time and in

a certain manner as a condition precedent to liability for loss. *M. K. & T. Ry. v. Harriman* 227 U. S. 657, 57 L. Ed. 690; 33 Sup. Ct. 397; *Castner v. Oregon-Washington R. & Nav. Co.* (Wash. 1916) 155 Pac. 167.

7. *St. L. I. M. & S. Ry. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248; *St. L. S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *St. L. I. M. & S. Ry. Co. v. Shepherd*, 113 Ark. 248, 168 S. W. 137. *St. Louis, I. M. & S. Ry. Co. v. Nunley*, (Ark.

time fixed by the bill of lading.<sup>8</sup> So it has been said that, (1) Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, the burden of showing the performance of such condition rests upon the shipper, and if he fail to show performance he cannot recover. (2) This rule applies not only to a case where it is made to appear during the progress of the trial that the plaintiff is seeking to recover upon a shipping contract containing such condition, but also to one where it has been counted upon in his petition or set out as defensive matter by the carrier. The burden of showing compliance with a shipping contract requiring the presentation of claims for damage to the carrier, within a given time, is on the shipper who seeks to recover for a loss or injury to goods, even though he alleged a contract of shipment in general terms and the contract merely appeared in the evidence. The stipulation, therefore, is not merely a conventional limitation of the shipper's right to sue the carrier as he is left at liberty to sue at any time within the period fixed by the statute of limitations, but it is an essential condition of the contract by which he is required to make his claim within the prescribed time, or in season for the carrier to ascertain the facts for his safety against spurious claims, and, having presented his claim, as required by the contract, the shipper may delay suit. He must, though, show performance of the provision in order to recover.<sup>9</sup>

1915), 179 S. W. 369, 370.

8. *Henry v. C. M. & P. S. Ry. Co.*, (Wash. 1915), 147 Pac. 425, 431.

9. *Culbreth v. Atlantic Coast Line R. Co.*, (N. C. 1915), 86 S. E. 624, 626.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, declaring that it will be presumed that notice of claim has been given, unless want of notice has been specially pleaded under oath, evidence that notice of claim for injuries to a shipment of live stock had no:

been given within the time fixed in the contract of shipment cannot be received, where a want of notice was not especially pleaded under oath. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361, 362.

Where a shipper gave notice of injuries to cattle, the fact that the claim filed with the notice was not so large as the amount sued for will not defeat recovery, although it should be considered on the question whether the amount sued for was excessive. *Pecos & N. T.*

Therefore a shipper should keep careful records of the filing of his claim. In this connection it may be noted that the filing of a suit within 30 days is a compliance with the provision in a bill of lading that notice of loss must be given within 30 days.<sup>10</sup> And a provision in a live stock contract that notice of loss must be given within one day after the stock is delivered at destination and before it is mingled with other live stock need not be complied with where the injury to live stock does not develop until more than a day has elapsed,<sup>11</sup> since the imposition of such a requirement would be to compel the shipper to perform conditions required neither by his special contract nor by the law.<sup>12</sup> An important thing to be borne in mind is that the validity of a provision in the bill of lading that notice of loss must be given

Ry. Co. v. Holmes (Tex. 1915) 177 S. W. 505.

In an action for the damages to such shipment, the burden was on plaintiff, where no written notice was given, to show such actual knowledge of the damaged condition of the shipment on arrival and delivery to the consignee as would cause the delivering carrier to know that a claim for damages would be made. St. Louis, I. M. & S. Ry. Co. v. Cumbie (Ark. 1915) 177 S. W. 910.

A provision in a bill of lading requiring written notice of the intention to claim damages on account of a shipment to be given to the delivering carrier is reasonable, and compliance therewith is a condition precedent to a recovery and can only be dispensed with by showing that the delivering carrier had actual knowledge of the damaged condition of the shipment on arrival, and that a claim therefor would be made. St. Louis I. M. &

S. Ry. Co. v. Cumbie (Ark. 1915) 177 S. W. 910.

Where a contract for the shipment of live stock required the shipper, as a condition precedent to any right of action for loss or injury to the animals, to serve written notice, setting out in detail a full statement of losses or injuries and the amount thereof, which was for the avowed purpose of enabling the carrier to investigate and settle such claim before suit, the shipper may, in an action for injuries to live stock, recover damages in excess of the amount claimed in the notice; the notice being merely to afford the carrier an opportunity to investigate. Texas & P. Ry. Co. v. McMillen (Tex. 1916) 183 S. W. 773.

10. M. K. & T. Ry. Co. of Tex. v. Neale, (Tex. 1915), 176 S. W. 85.

11. Eoff & Snapp v. Scullin, (Ark. 1915), 179 S. W. 663, 664.

12. Eoff & Snapp v. Scullin, (Ark. 1915), 179 S. W. 663, 664.

before stock is removed or mingled is to be determined by the Interstate Commerce Act and not by a state statute.<sup>13</sup> A state court is bound by the construction given by the Federal courts to the Interstate Commerce Act. The provision in the uniform bill of lading that claims for loss or damage must be made within four months, is not void on the ground that it is made without consideration. Where a shipper gives notice of a loss after the expiration of four months and the auditor of the carrier asked for particulars and stated that the records showed delivery and the shipper did not comply with the request, there is no waiver by the carrier of the provision of the bill of lading.<sup>14</sup> And under the Carmack Amendment notice of loss need only be given to the initial carrier and does not need also to be given to connecting carriers.<sup>15</sup> A notice of loss given to one of four connecting carriers within the time provided in the shipping contract is notice to all connecting carriers.<sup>16</sup> But where the consignor of a shipment by a railroad upon loss thereof did not file his claim with the road at the place where the shipment originated, as required by the statute of that state, he cannot recover under such statute the \$50 penalty incurred by the road by its failure to settle the claim for loss of a shipment between points within the state within 90 days.<sup>17</sup> In a typical case a consignee

13. *Hovey v. Tankersley*, (Tex. 1915), 177 S. W. 153; *Crawford v. Southern R. Co.*, (S. C. 1915), 86 S. E. 19, 20.

The question as to the proper construction of a bill of lading for an interstate shipment issued under the Carmack Amendment, is a Federal one which will sustain the appellate jurisdiction of the Federal Supreme Court over a state court. *Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co.* 36 Sup. Ct. Rep. 541, 542, 241 U. S. 190, 60 L. Ed.

14. *Stevens & Russell v. St. Louis Southwestern Ry. Co.*, (Tex. 1915), 178 S. W. 810, 812.

15. *Norfolk & W. Ry. Co. v. A.*

*J. Steele & Son* (Virginia 1915), 86 S. E. 124, 127.

16. *Gulf, C. & S. F. Ry. Co. v. Bogy*, (Texas 1915), 178 S. W. 577, 578; *No. Pac. Ry. v. Wall* 241 U. S. 87, 36 Sup. Ct. 493.

17. *Hamlet Grocery Co. v. Southern Ry. Co.*, 87 S. E. 57.

A shipper of live stock did not pay the freight and feeding charges on a horse injured. The carrier's agent with whom he filed his claim refused to consider the same until the bill of lading was filed which the shipper refused, claiming he had not signed it. Held, that the shipper was not entitled to add to the value of the horse the amount of unpaid freight and feeding

of freight was notified that it had arrived in a damaged condition and a notation to this effect was made on the expense bill. The consignor notified the claim agent of the damage and said a claim would be filed. An employe of the consignee told the station agent of the carrier, that a claim would be filed, but no notice of the claim was given. It was held that the notation made by the agent of the delivering carrier on the expense bill, was not in effect a notice in writing in compliance with the stipulation. Even if it should be said that the agent acted for the shipper, and not for the carrier, in making the notation, it was not such notice to the carrier as it was entitled to. Nor was the notice given by the shipper to the delivering carrier nor that given by the agent of the consignees, that a claim for damages "would be filed," a compliance.<sup>18</sup> Nor is it a compliance (with the provision) to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present a claim for loss, damage or detention. It does not inform the carrier of the nature, extent, amount or cause of damage. It gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required.<sup>19</sup> Since it is the duty of the initial carrier to issue a bill of lading covering the entire movement from origin to destination, even though it only issues a bill of lading from origin to intermediate points, it is, nevertheless, responsible for a loss which occurs on any part of the movement.<sup>20</sup> In

charges, nor was he entitled to the statutory penalty of \$50 for non-payment of his claim. *Southern Ry. Co. v. Kimball* (S. C. 1916) 88 S. E. 14.

Where the consignor of a shipment by railroad upon loss thereof did not file his claim with the road at the place where the shipment originated, as required of consignors by the statute, he cannot recover under such statute the \$50 penalty incurred by the road by its failure to settle the claim for loss

of a shipment between points within the state within 90 days. *Hamlet Grocery Co. v. Southern Ry. Co.* (N. C. 1915) 87 S. E. 57.

18. *St. Louis Southwestern Ry. Co. of Texas v. Overton*, (Texas 1915), 178 S. W. 814, 816.

19. *Kidwell v. Oregon Short Line Ry.*, 208 Fed. 1, 3, 125 C. C. A. 313.

20. *Michelson v. Judson Freight Forwarding Co.*, (Ill. 1915), 109 N. E. 281, 285.

decisions rendered prior to the passage of the Cummins Act it has been said in the state courts that in determining the reasonableness of a stipulation providing for notice of loss, no fixed rule or test can be laid down because what might be reasonable in one case might not be in another.<sup>21</sup>

In a typical case a livestock contract contained the following provision: "(6) The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of said company before said stock has been removed from the place of destination or mingled with other stock." It was held that while in a few instances, provisions similar to this have been held to be in the nature of statutes of limitations; the decided weight of authority holds and the better reason is, that their effect is simply to limit the carriers' common-law liability. That a common carrier may by special contract limit the liability which it would otherwise incur, provided the terms of the special agreement are reasonable, was recognized in the Nilson case and is the generally accepted doctrine in this country. 4 Rul. Case Law, No. 230, 253. Whether such special contract is or is not valid depends upon its reasonableness; and this question is always referable for solution to the facts and circumstances of the particular case.<sup>22</sup> So it has been held upon common-law principles and authorities, where a shipper signs and accepts from a carrier a bill of lading issued by the carrier containing a clause stipulating that "claims for loss or damage shall be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than ten days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," constitutes a binding contract; and this clause is not void upon the ground that the carrier seeks thereby to limit its liability, and does not give as consideration therefor extra service or monetary consideration to the shipper, or that it is contrary to the public policy of the state. Such a

21. *Crawford v. Southern R. Co.*, (S. C. 1915), 86 S. E. 19, 20.

22. *Wall v. N. P. Ry. Co.*, (Mont. 1914), 145 Pac. 291, 292.

clause, when applied to shipments of perishable products, such as turnips, is not an unreasonable limitation as to the time in which the claim is to be presented.<sup>23</sup> In another case for injuries to live stock, the evidence tended to prove that on December 31, 1912, the shipper delivered a car load of horses and mules to the Richmond, Fredericksburg & Potomac Railroad Company, at Richmond, in good order. They were loaded about 3 o'clock p. m. that day, and arrived at Winnsboro about 3 o'clock a. m. January 2, 1913, without having been fed, watered, and rested in transit, as required by the federal statute. When they were unloaded, one of the mules was in bad condition, being hardly able to get from the station to plaintiff's stable, and in a short time others were taken sick with shipping cold, or influenza, with the result that four died and six were sick and required special care and attention for some time. The testimony did not show when the four died, nor how long the others were sick, nor when they were restored to normal condition. It did show that none died within five days after arrival, and that, before any died, they were examined by the carrier's veterinary surgeon, who gave some directions and assistance in their treatment, and that he reported the result of his examination to one of its officers, but to what officer did not appear, nor did it appear at whose request the veterinarian's examination was made. Claimant gave the carrier no notice in writing of his claim, except by commencement of the action on July 11, 1913. The carrier defended on the ground that notice was not given within five days as provided by the bill of lading. The court held, as applied to the facts and circumstances of the case, the stipulation in question was manifestly unjust and unreasonable. To give it literal effect would work a forfeiture of plaintiff's claim because of his failure to do that which was impossible. The undisputed evidence shows that he could not have ascertained the nature and extent of his damages within five days from the time the stock was removed from the car, for these were uncertain, until the animals that were made sick either died or were restored to normal condition. It fol-

23. *W. H. Mitchell & Co. v. A. C. L. R. Co.*, (Ga. 1915), 84 S. E. 227, 228.



lows that, in so far as the stipulation required that he should make his claim in the manner and within the time specified, it was unreasonable and void. But the stipulation should have a reasonable construction; and, although the limit of time was unreasonably short, on account of the peculiar circumstances, the plaintiff was not excused from giving any notice at all, for it must be presumed that the parties contemplated that some notice of the claim should be given, and that it should be done within a reasonable time, after the plaintiff, in the exercise of due diligence, could ascertain the nature and extent of his damage. The court must not be understood, from what has been said, as holding that the question whether a thing has been done within a reasonable time is, under all circumstances, a question of law. It is such when the facts are undisputed and susceptible of only one reasonable inference; otherwise, it is a question of fact for the jury.<sup>24</sup> So it is held the question as to whether notice was given as required by the contract of shipment is for the jury.<sup>25</sup> And where a carrier pleads a provision in the bill of lading that notice of loss or damage must be given within 30 days, the shipper has the burden of proving that such notice was given.<sup>26</sup> But a carrier can avail itself of the defense presented by the limitation of liability contained in the bill of lading without especially pleading the same where the bill of lading has been offered in evidence by the plaintiff.<sup>27</sup> The scope of such a provision has been applied to a case where through the negligent delay in shipping apple barrels, apples at the point of destination rotted. A claim for such injury is within the scope of a provision in the bill of lading issued for the apple barrels that claims for loss, damage or delay must be made within four months after delivery; since the clause in the bill of lading was obviously intended to be comprehensive and to include all damages that reasonably might be anticipated to follow the negligent breach of the carrier's duty to deliver the barrels within a reasonable time.<sup>28</sup>

24. *Crawford v. Southern R. Co.* (Ky. 1915), 172 S. W. 1096.  
(S. C. 1915), 86 S. E. 19, 20.

27. *Ex parte Kilgore*, (Ala.

25. *Ball v. Lusk*, (Mo. 1915), 1915), 67 So. 1002.

175 S. W. 238.

28. *Bailey v. M. P. Ry. Co.*,

26. *Adams Express Co. v. Cook*, (Mo.), 171 S. W. 44, 46.

The decisions of the various states have varied as to what limitation of time in which to give notice is reasonable. It has been held the provision in a bill of lading that a claim for damages must be presented to a carrier within 10 days is void.<sup>29</sup> The exact contrary also has been held.<sup>30</sup> A provision in a live stock contract requiring that written notice of damage be given within 5 days after unloading, is valid.<sup>31</sup> And a provision in the bill of lading that claims for loss must be filed within four months after delivery is valid under the Carmack Amendment.<sup>32</sup> The provision does not have to be supported by a separate consideration aside from the contract as a whole.<sup>33</sup> A stipulation that a claim for loss or injury to a shipment of live stock must be presented to the carrier within thirty days after it shall have occurred, is valid under the law of Washington.<sup>34</sup> A limitation in the live stock contract requiring that written notice of damage must be given before the stock is removed, slaughtered, or min-

29. *I. C. R. Co. v. S. M. Avery*, (Ala. 1914), 67 So. 414.

30. *Armstrong v. I. C. R. Co.*, (Ky. 1915), 172 S. W. 947; *Howard & Callaghan v. I. C. R. Co.*, (Ky.), 171 S. W. 442, 445; *Spada v. Pennsylvania R. Co.*, (N. J.), 92 Atlantic, 379, 381.

*Olivit Bros. v. Penn. R. Co.* (N. J. 1916) 96 Atl. 582.

31. *Dunlap v. C. & A. Ry. Co.*, (Mo. 1915), 172 S. W. 1178, 1179.

32. *Bailey v. M. P. Ry. Co.*, (Mo. 1914), 171 S. W. 44, 45; *Davenport v. Chesapeake & O. Ry. Co.*, 149 N. Y. Supp. 865, 866; *Stevens and Russell v. St. Louis Southwestern Ry. Co.*, (Tex. 1915), 178 S. W. 810, 812.

33. *St. L. S. W. Ry. Co. v. Overton*, (Texas 1915), 176 S. W. 814, 816.

34. *Henry v. C. M. & P. S. Ry. Co.*, (Wash. 1915), 147 Pac. 425, 428.

Where a contract of shipment of live stock provided that the shipper after delay or injury, as soon as he discovered any loss or injury to the stock, should promptly notify some general officer, claim agent, or station agent of the railroad before the stock was mingled with other stock or removed from the place of destination, specifically making compliances with such requirement a condition to recovery, and the shipper, upon delay in transit and discovery of injury, failed to give notice thereof before bringing his action, nearly 60 days after the cattle had been sold by it and passed out of its control, such action was barred; the requirement of notice to the carrier being reasonable. *Baldwin & Riggs v. Chicago, R. I. & P. Ry. Co.* (Ia. 1916) 156 N. W. 17.

gled and that a claim must be presented within 91 days, is valid.<sup>35</sup> A provision in a live stock contract that notice of loss must be given to the carrier within one day is reasonable.<sup>36</sup> But a provision in a live stock contract that the shipper, as a condition precedent to his right to recover damages for loss or injury to the stock, must give notice in writing of his claim to some officer or station agent of the company before the stock has been removed from the place of destination or mingled with other stock, is void.<sup>37</sup> The importance and reasonableness of timely notice of damage to goods is at once apparent, for it gives the carrier an opportunity to examine them, so as to explain or meet any charge of neglect or breach of contract which may be made by the consignee. Where there is a total failure to deliver, however, although it is desirable that early notice be given the carrier, there is no such necessity for prompt notice as in cases of damage.<sup>38</sup>

Under the federal law, which is controlling upon the court in determining questions of liability properly arising out of interstate shipments, a provision in a live stock contract or bill of lading to the effect that as a condition precedent to a recovery for any damages for delay, loss, or injury to live stock covered by the contract, the shipper will give notice in writing of the claim to some general officer or the nearest station agent, or to the agent at destination, or some general officer of the delivering line, before the stock is removed from the point of shipment or the place of destination, and before such stock is

35. *Potter v. K. C. S. Ry. Co.*, (Mo. 1915), 172 S. W. 1153.

Under *Vernon Sayles' Ann. Civ. St.* 1914, art. 5714, declaring that no stipulation in any contract requiring notice to be given of claim for damages as a condition precedent to the right to sue shall be valid, unless the stipulation is reasonable, a stipulation in a contract for the shipment of live stock, requiring presentation of claim to be made within 91 days is no de-

fense, and cannot be relied on, unless its reasonableness be pleaded. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361, 362.

36. *St. Louis Southwestern Ry. Co. v. Burnett*, (Ark. 1915), 174 S. W. 1165; *St. L. & S. F. R. R. v. Zickafoose*, (Okla. 1913), 135 Pac. 406.

37. *Wall v. N. P. Ry. Co.*, (Mont. 1914), 145 Pac. 291, 293.

38. *D'Arso v. Navigazione Alta*

mingled with other stock, such notice to be served within one day after the delivery of such stock at destination, is valid.<sup>39</sup> A provision in a bill of lading that suit must be commenced within six months after the damage occurred is reasonable and valid.<sup>40</sup>

It had also been held in some of the state courts that a provision in a bill of lading, requiring notice of loss or injury to the stock shipped to be given within seven days, is unavailing, unless

Italia (N. Y. 1915), 154 N. Y. S. 158, 159.

39. Hudson v. Chicago, St. P., M. & O. Ry. Co., 226 Fed 39, 44. St. Louis & S. F. Ry. Co. v. Ladd, 33 Okla. 160, 124 Pac. 461. Chicago, R. I. & P. Ry. Co. v. Bruce, (Okla. 1915), 150 Pac. 880.

Washington Horse Exchange v. Louisville & N. R. Co. (N. C. 1916) 87 S. E. 941.

The initial carrier may validly stipulate in the bill of lading, issued conformably to the Carmack Amendment for an interstate shipment that "claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed" Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co., 36 Sup. Ct. Rep., 541, 542, 141 U. S. 190, 60 L. Ed.—This ruling, of course, follows a long line of Supreme Court decisions.

Misdelivery of an interstate shipment by the terminal carrier must be regarded as "failure to make delivery," within the meaning of a clause in the bill of lading issued by the initial carrier conformably to the Carmack Amendment, which casts upon that

carrier responsibility with respect to the entire transportation, that "claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed." Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co. 36 Sup. Ct. 541, 542, 241 U. S. 190, 60 L. Ed.—

40. Kansas City Southern Ry. Co. v. Bull, (Ark. 1915), 179 S. W. 172, 174; Chicago R. I. & P. Ry. Co. v. Bruce, (Okla. 1915), 150 Pac. 880.

The shipping contract provided that written notice of a claim for damages should be given to some officer of the company or to the nearest station agent before the stock should be removed from the destination or place of delivery and before it had been slaughtered or intermingled with other stock. The cattle were kept at the quarantine yards seven days and there dipped by the servants of the carrier under the supervision of the Bureau of Animal Industry. No claim was made for damages caused after the shipment left the yards. Held, under such circumstances written notice was not re-

there is an independent consideration, as a reduction in freight rates, to support the agreement.<sup>41</sup> So where a bill of lading fixing an agreed valuation for shipment of live stock showed that the rate was reduced in consideration of the lessened liability, but did not show that the reduction of the rate was a consideration for the agreement to give notice of injuries in writing within ten days after delivery of the shipment, or that such provision would have been omitted from a bill of lading containing no limitation of liability, the provision for notice is unenforceable, being without consideration.<sup>42</sup>

**2. Party to Whom Notice Should be Given.** Most livestock contracts carry a provision that notice of loss must be given to agent at destination. In many instances there is no such agent. So it has been held a provision in a live stock contract that notice of loss must be given to the nearest station agent of the carrier or its agent at destination before the stock is removed or mingled with other stock is unreasonable under the Interstate Commerce Act where it does not appear that the carrier had an agent at destination.<sup>43</sup>

In a typical case the provision in a livestock contract was as follows: "(6) The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of said company before said stock has been removed from the place of destination or mingled with other stock." In a case brought for loss and

quired as to damages then apparent, but in order to recover for damages so caused, but thereafter developing, notice was required, unless waived. *Broadhead v. Atchison, T. & S. F. Ry. Co.* (Kans. 1916) 155 Pac. 20.

41. *Botts v. St. Louis & H. Ry. Co.* (Mo. 1915) 177 S. W. 746.

42. *Yazoo & M. V. R. Co. v. Bell* (Miss. 1916) 71 So. 272.

That a shipper of live stock filed a claim for damages with the

carrier's agent does not show an acceptance of the bill of lading limiting the carrier's liability where the shipper informed the agent he had not signed the bill, and the agent refused to take up the claim until the bill of lading was filed therewith. *Southern Ry. Co. v. Kimball* (S. C. 1916) 88 S. E. 14.

43. *Hovey v. Tankersley* (Tex. 1915), 177 S. W. 153, 154.

damage to livestock, the carrier defended on the ground no notice was given to its agent. However, it appeared an agent was inaccessible at the unloading point. Held, the evident purpose of this provision of the contract was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. The contract was silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle at the stockyards until he could find an officer or station agent of the carrier. No particular officer or station agent was designated, and, if this provision was to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There was not a suggestion in the contract, in the pleadings or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, where the stock was unloaded, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail claimant would have been in no better position, though doubtless a letter written to the station at Belgrade, and mailed postpaid at Chicago, could have sufficed for a literal compliance with the terms of this provision. But, in any event, claimant would have had to bear the burden of keeping his cattle on the cars or in the stockyards until the notice had been received and a reasonable time for inspection had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle would suffice, it was senseless. If it was construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it was unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact.<sup>43 1/2</sup>

<sup>43 1/2</sup>. Wall v. Northern Pac. Ry Co., (Mont. 1914), 45 Pac. 291, 292.

In *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574, there was presented a case in all particulars identical with this one, and the court there said: "If the carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding, and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given and an inspection, if desired, speedily made, then a contract requiring notice to be given to any officer or agent of the carrier is not reasonable in its character."<sup>44</sup> In an action for

But a notice to an agent of the delivering carrier was sufficient, it being made the agent of the initial line by federal law.

*Nor. Pac. Ry. v. Wall*, 36 Sup. Ct. 493, 241 U. S. 287, 60 L. Ed.

44. *Baxter v. L. N. A. & C. R. Co.*, 165 Ill., 78, 45 N. E. 1003; *Wall v. N. P. Ry. Co.*, (Mont. 1914), 145 Pac. 291, 292, 293.

A requirement in the bill of lading for an interstate shipment of live stock that the shipper shall give notice of injury or damage to an agent of the carrier within one day after arrival and before the stock are removed from the yards, or mingled with other stock, is unreasonable and not binding when no reduced rate therefor is shown, it does not appear that there was

any agent of the carrier at the point of destination to whom the notice could be given, and the damage claimed is the decrease in the market during the time the shipment was delayed. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Tex. 1915) 177 S. W. 543.

Where a bill of lading required the shippers to serve notice of claim for injuries to live stock, the consignee, though he was part owner of the animals and joined in an action to recover for damages, need not serve such notice; it having been served by the shipper. *Texas & P. Ry. Co. v. McMillen* (Tex. 1916) 183 S. W. 773.

Where a contract of shipment of live stock provides for notice of claim for any injury within 10

damages to a shipment of live stock from delay and rough handling, under a stipulation in the written contract that as a condition precedent to any claim of damages the shipper, as soon as he discovered any injury, should promptly give written notice to some general officer, claim or station agent, or to the agent at destination, or to some general officer of the delivering line, before removing the stock, and within one day after delivery, and the shipper's agreement that failure to give the notice should bar recovery, the carrier had the burden of showing that the stipulation, as to the particular shipment, was reasonable, and that it had an officer or agent at or near the place where the notice was to be given, and where there was no such allegation and proof, the shipper was not required to prove notice or an excuse for not giving notice; and the fact that damages were known to the shipper, or the shipper's direction to a commission company to put in the claim, did not dispense with proof that there was an agent to receive notice.<sup>45</sup> Where a through bill of lading for an interstate shipment of horses over several lines required as a condition to recovery that notice of injuries should be given to the last carrier before removal, the fact that the agent of the last carrier knew of the injuries relieves the shipper of the necessity of giving such notice; the knowledge of the agent of the last carrier being imputable to the initial carrier.<sup>46</sup> Under a shipping contract stipulating that the shipper shall, as soon as he discovers any injury, promptly give written notice to the carrier's agent, before removing the stock and within one day after delivery, and that failure to give the notice shall bar recovery, the carrier had the burden of showing that the stipulation, as to the particular shipment, was reasonable, and, where

days, and before the stock are mingled with other stock, where the shipper notified the carrier en route of alleged injuries, and at the instance of the carrier veterinary surgeons examined them, and they were reloaded and conveyed to destination, notice of claim need not be given, to entitle the shipper to recover for the injuries. *Cast-*

*ner v. Oregon-Washington R. & Nav. Co.* (Wash. 1916) 155 Pac. 167.

45. *Chicago, R. I. & P. Ry. Co. v. Dalton* (Tex. 1915) 177 S. W. 556.

46. *Washington Horse Exchange v. Louisville & N. R. Co.* (N. C. 1916), 87 S. E. 941; *C. R. I. & P. Ry. v. Linger*, (Tex. 1913), 156 S. W. 298, 299.



there was no such allegation and proof, the shipper was not required to prove notice or an excuse for not giving notice; and the fact that damages were known to the shipper, or that the shipper had directed a commission company to put in the claim, did not dispense with proof that there was an agent to receive notice.<sup>45</sup> Where a bill of lading required claims for damages to be reported by the consignee in writing to the delivering carrier within 36 hours after notice of the arrival of the shipment, compliance therewith was not excused by the fact that some agent or employe of the delivering carrier whose duties did not include the investigation of such matters or the report thereof to some agent in authority, knew of the damaged condition of the shipment, on arrival at destination, no agent in authority knowing that the shipment was damaged or that a claim for damages would be made.<sup>47</sup> But in a similar case it was held that where peaches shipped under a bill of lading requiring notice of any damages to be given within 36 hours after the arrival of the shipment at their destination, were unloaded by the carrier's employes at its dock and placed in piles as unloaded; neither the consignee nor his representative being allowed on the dock until the cars were completely unloaded, and the consignee, upon discovering that the peaches were in a damaged condition, went to the dock foreman employed by the carrier, and who was in authority at the dock, and told him that the peaches were not iced and were in a bad condition, and the foreman examined the peaches without making any comment, this charged the carrier with notice that compensation would be claimed and excused compliance with the bill of lading; it not being necessary that the consignee should tell the foreman that it was his intention to sue for damages, as it was not required that the written notice should contain such statement.<sup>48</sup> But since the Carmack Amendment makes it obliga-

47. *St. Louis, I. M. & S. Ry. Co. v. Cumbie* (Ark. 1915) 177 S. W. 910.

48. *St. Louis, I. M. & S. Ry. Co. v. Starbird* (Ark. 1915) 177 S. W. 912, 913.

Where a shipper consigned lum-

ber to its own order, taking a bill of lading from the initial carrier stipulating against liability for failure to deliver unless notice was given within four months after a reasonable time for delivery had elapsed, where such notice was giv-

tory upon the initial carrier to issue a through bill of lading, the connecting carrier becomes the agent of the receiving carrier for the purpose of receiving the goods and delivering the property.<sup>49</sup> Therefore a provision in a bill of lading governing an interstate shipment of live stock that notice of loss must be given before the live stock is removed from the place of destination or mingled with other stock is complied with when such notice is given to the delivering carrier although such carrier is not the initial line. It is not necessary that notice be given to the initial line as any connecting carrier is its agent.<sup>50</sup>

**3. Manner of Giving Notice.** A carrier may incorporate in the contract of shipment a stipulation for written notice of damages. But it is sometimes difficult to ascertain the exact manner of giving the notice. As has been seen, the form must be sufficiently specific to apprise the carrier of the damage and intention to file a claim, with reasonable certainty. Frequently shipping contracts provide simply that "notice" must be given. In other cases "written notice" is specified. Where "written" notice is specified, oral notice is clearly not sufficient, unless the carrier has waived the provision. If simple "notice" is specified, then anything which gives the carrier knowledge should suffice. If the notice is to be given to an agent, mailing is not sufficient, unless actually received by the carrier. In other words, depositing a notice of claim in the mail is not notice to the carrier, until received by it.<sup>51</sup>

en to the terminal carrier 4 months and 11 days after the misdelivery, but within 4 months after the shipper received actual notice of the misdelivery, the notice was sufficient to hold the initial carrier, since the shipper could assume that the terminal carrier would not make an unauthorized delivery, and was not chargeable with notice of any misdelivery, so that the time for presenting the claim did not begin to run until the shipper had received actual information of the misdelivery. St. Louis, I. M.

& S. Ry. Co. v. Blisscook Oak Co. (Ark. 1915) 176 S. W., 325.

49. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 196, 206, 55 L. ed. 167, 178, 182, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. Ed. 516, 253, 32 Sup. Ct. Rep. 205

50. Northern P. R. Co. v. Wall, 36 Sup. Ct. Rep. 493, 496, 241 U. S. 87, 60 L. Ed.—; Overton v. C. R. I. & P. Ry., (Tex. Civ. App. 1913), 160 S. W. 111.

51. Where a contract for ship-

4. **Form of Notice.** Any written communication (where notice in writing is required), which appraises the carrier with reasonable certainty that a claim will be filed, and describing the shipment with such definiteness that it can be traced by the carrier without undue hardship, is sufficient notice. Giving the date

ment by rail of mules provided that the shipper should present any claim for damages within 10 days, and before the stock had been mingled with other stock, an oral claim for damages was sufficient compliance. *Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.* (Mo. 1915) 180 S. W. 412.

Where a shipper of cattle addressed his notice of claim for negligent delay, which the contract required to be given before the stock was removed from the place of destination, to the building of another railroad company which was a part of the carrier's system, and the carrier's claim agent replied to the notice, the fact that it was not addressed to the carrier is no ground for objection. *Rissler v. Missouri Pac. Ry. Co.* (Mo. 1916) 183 S. W. 676.

The requirement of a contract of shipment, that notice of claim for loss be given at the point of shipment or delivery, is not satisfied by mailing it to another point. *Equity Elevator Co. v. Union Pac. Ry. Co.* (Mo. 1915) 177 S. W. 773.

Where a bill of lading covering a shipment of peaches required written notice of any damages to the shipment to be given the delivering carrier within 36 hours

after their arrival at destination, to excuse such written notice it was necessary that personal notice be given to the employe or agent of the carrier whose duty it would be if written notice had been received to make the inspection to ascertain the nature and extent of the damage, and noncompliance was not excused by the fact that longshoremen who unloaded the peaches at the carrier's dock knew they were in a damaged condition, or the fact that the carrier maintained an inspector at the dock, it not appearing that he had any duty to perform concerning the peaches. *St. Louis, I. M. & S. Ry. Co. v. Starbird* (Ark. 1915) 177 S. W. 912.

In *St. Louis, I. M. & S. R. R. Co. v. Farlow* (Ark. 1909) 117 S. W., 517, the identical question presented here was discussed. In that case the court held that the provision in the bill of lading requiring notice of loss or damage to be given to a carrier meant actual notice. The court held that the provision was valid and enforceable and said:

"In the stipulation in the case before us the notice in writing was required to be served within one day after the delivery of the stock at destination. The

and place of arrival, car number and initial, is sufficient. Section 3 of the uniform bill of lading provides as follows: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." In construing this section, the Interstate Commerce Commission has issued Conference Ruling 456 which is as follows: "It is the view of the Commission that the provision in the uniform bill of lading, requiring that claims for loss, damage, or delay be made within a period of four months after the shipment was made, is legally complied with when the shipper, consignee, or the lawful holder of the bill of lading, within the period specified, files with the agent of the carrier, either at the point of origin or the point of delivery of the shipment, or with the gen-

object of the notice was to give the carrier an opportunity to fully and fairly investigate the claim for damages before the horses should be placed beyond the power of the carrier to examine and inspect by reasonable exertion. It is obvious that this could have been done only by actual notice. The contract says that the notice must be served within the one day, and this means actual notice. Notice by mail, then, would not be sufficient unless it was received within the one day."

In *Johnson v. N. Y. N. H. & H. R. R. Co.*, 88 Atl. 988, it was held that notice by mail might be given if "seasonably mailed" before the expiration of the time limit.

I. C. C. Conference Ruling 462 provides as follows:

**"Carrier Must Investigate Before Paying Claims—**Upon further consideration Conference Ruling 15 is modified as follows:

A carrier can not shield itself from responsibility in paying a claim by accepting the authority of a connecting line to pay it, but must ascertain the lawfulness of the claim and allow it or not upon the basis of its own investigation. This is not to be understood, however, as requiring each carrier interested in the claim to make an independent investigation. The principle of direct investigation embodied in the rules of the freight claim association, whereby the carrier against which a claim is presented undertakes to make the investigation for itself and for the other carriers concerned in the joint movement out of which the claim arises, is approved by the Commission as a means of expediting the adjustment of claims. In all cases, however, the investigation so made must be thorough and must disclose a lawful basis for payment before the

eral claims department of the carrier, a claim or a written notice of intended claim, describing the shipment with reasonable definiteness. In all cases the provisions of the standard form for the presentation of claims, which was approved by the Commission on December 2, 1913, should be complied with so far as possible, and proof or evidence of the claim should be presented to the carrier within a reasonable time." A distinction should be drawn between the giving of notice that a claim will be filed, and the claim itself. The giving of notice may be broad and informal, unsupported by documents, whereas in filing a claim, the amount of the damage should be given, and the claim supported by the expense bill and bill of lading wherever possible, together with such information as called for by the standard claim forms. Under the Cummins Amendment ninety days is allowed for giving notice of a claim, and four months for filing the claim itself. A claim for the value of a shipment of flour misdelivered by the carrier is sufficiently made to satisfy the requirement of the bill of lading that claims based on failure to make delivery shall be made in writing within four months after the time for delivery has elapsed, where the shipper, after making an investigation in response to a telegram from the carrier's traffic manager, telegraphed the latter five days after the arrival of the flour at destination, "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle."<sup>52</sup>

**5. Waiver of Notice.** It has been held that provisions in the bill of lading that claims for loss or damage must be made within a certain period may be waived by the carrier. Where, within four months after the delivery, the shipper, or one authorized to do so for him, filed with the general freight claim agent of delivering carrier (even though he did not reside at the point of delivery) a written claim for loss or damage, and where the general freight claim agent made claimant an offer on behalf of carrier in set-

claim is adjusted. (See Rulings 68 and 236)." The Commission held *In re Express Rates*, 24 I. C. C. 380, p. 396, that express companies should dispose of loss

and damage claims within six months at the outside."

52. *Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co.* 36 Sup. Ct. Rep., 541, 542, 241 U. S. 190, 60 L. Ed.—

tlement of the claim, which offer was refused, and he thereafter withdrew the offer and declined payment of the claim, on the ground of non-liability, and no question was at any time raised as to failure to present the claim to the agent at the point of delivery rather than to one high in authority, this amounted to waiver of such failure to file the claim with the agent.<sup>53</sup> The purpose of a condition in the contract requiring notice of loss is, of course, to give the carrier timely notice of the condition of the stock and of the assertion of the claim for damages and opportunity to investigate the matter while the facts were fresh and accessible. This being the purpose of the condition, it is well satisfied when the agent of the carrier, to whom notice might be given, has actual knowledge of the condition of the stock at the time of their delivery at the point of destination and of the fact that a claim for damages will be asserted as it would be by the service of a written notice; and so, if the agent to whom written notice might be given, induces the owner by his conduct or assurance to believe that written notice will not be necessary, and, acting upon this belief, the owner fails to give the written notice, the carrier should not be allowed to defeat his claim because he failed to give the written notice. There is no particular sanctity about a contract for the shipment of live stock or about the conditions in such a contract, nor is there any reason why the same rules of law that govern other persons in their relations to contracts and their right to waive provisions inserted for their benefit should not be applied to the parties to these contracts. In private affairs, uncontrolled by statute, there is scarcely any provision in a contract that a party to the contract may not waive if he pleases to do so. The general rule being that a party to a contract, who is fully advised of the facts, will not be permitted, by his conduct manifesting a waiver, and upon which the other party relied and had a right to rely, to prejudice the rights of the other party by asserting that the stipulation could only be waived in writing, this

53. See *Post v. A. C. L. R. Co.*, 138 Ga. 763, 765, 76 S. E. 45, and cases cited; *Carter v. Southern Railway Co.*, 3 Ga. App. 35 (5), 59 S. E. 209; *L. & N. R. Co. v. Tharpe*,

11 Ga. App. 471, 75 S. E. 677; *Shaw* 86 S. E. 95. *Shama v. C. M. & St. P. Ry. Co.*, (Minn. 1915), 151 N. W. 406.

54. *Howard & Callaghan v. I. C.*

well established principle should be applied to contracts like this.<sup>54</sup> So a provision in the live stock contract that claims for loss must be presented within 10 days after the removal of the animals from the cars may be waived by the carrier and the fact that such limitation is filed with the Commission cannot change this rule.<sup>55</sup> However, it has been stated that it is doubtful whether, in view of the fact that the form of the bill of lading under which this shipment was made was approved by the Interstate Commerce Commission, the carrier has power to waive its provisions.<sup>56</sup> But another court has said that the Interstate Commerce Com-

R. R. Co., (Ky.), 171 S. W. 442, 445, 446.

A carrier of an intrastate shipment may waive the stipulation in the contract of shipment for written notice of damage. *Kolkmeier v. Chicago & A. R. Co.* (Mo. 1916) 182 S. W. 794.

55. *Howard & Callaghan v. I. C. R. R. Co.*, (Ky.), 171 S. W. 442, 445, 446.

The principle that such a provision may be waived is not contrary to the Interstate Commerce Act and the amendments thereto, on the theory that it grants a preference. *T W. Mewborn & Co. v. Louisville & N. R. R.* (N. C. 1915) 87 S. E. 37.

Ruling of the Interstate Commerce Commission No. 456 dealing only with the form of written notice to a carrier of live stock that the stock has been injured, expressing the view of the Commission that a claim, or written notice of intended claim, describing the shipment with reasonable definiteness, will be sufficient, does not alter the rule that the carrier's requirement of notice in writing of injury is waived upon proof of actual knowledge of the injury. *Schloss-Bear-Davis Co. v. Louis-*

*ville & N. R. Co.* (N. C. 1916) 88 S. E. 476.

56. *Davenport v. C. & O. Ry. Co.* 149 N. Y. Supp. 865, 866.

Since the Interstate Commerce Act prohibits the giving of preferences by means of consent judgments or the waivers of defenses open to the carrier, where the bill of lading in case of interstate shipment contained a condition that, "if claims for damage be not made within ten days after the delivery of the property the carrier shall not be liable," the liability of the carrier cannot be predicated upon the mere fact that the carrier rejected the claim for other reasons when it was presented out of time. *Olivit Bros. v. Penn. R. Co.* (N. J. 1916) 96 Atl. 582.

Quaere: Under the rules of decisions of the Supreme Court of the United States, in construing the Carmack Amendment (Act. Cong. June 29, 1906, c. 3591, §7, pars. 11, 12, 34 Stat. 584, 595, amending Act Cong. Feb. 4, 1887, c. 104, §20, 24 Stat. 379, 386 (U. S. Comp. St. 1913, §8592), can a waiver of the provisions of a contract for an interstate shipment of live stock, requiring notice in writing of any damage to the stock before

mission does not attempt to enforce contracts made between carrier and shipper, and has no authority to determine the validity and effect of these contracts; the parties thereto being left to the courts.<sup>57</sup> In a typical case it appeared the railroad agent at the place of destination was notified that the shipper would not receive the stock because of their damaged condition, and thereupon he told the shipper to take the stock and do the best he could for them, and that he would be treated right about it. The agent was also present when they were unloaded and actually saw the condition and knew the cause to which it was attributed. In addition to this, the railroad company employed and paid a veterinarian to attend the stock, and the agent of the company wrote on the bill of lading the damaged condition of the stock, the cause that produced it and that it was received by the shipper under protest. Such conduct fully meets all of the conditions of a valid and sufficient waiver. In short, the actual notice the agent had was much fuller and more accurate than he would have had if the written notice had been given.<sup>58</sup> Where a carrier invites a claim for loss

their removal from the place of destination, etc., be shown in any other way than that named in the contract? viz: "The written notice herein provided for cannot and shall not be waived by any person, except a general officer of the company, and he only in writing." *Atchison T. & S. F. Ry. Co. v. Lynn & Hudson (Okla. 1916)* 154 Pac. 657, 658.

✓ In the Matter of Bills of Lading, 29 I. C. C. 417, which was a proceeding brought to investigate the practice of the carriers with reference to enforcing the four months limit in the uniform bill of lading, the Commission found that the carriers enforced these provisions in some cases and disregarded them in others. The

Commission held that to prevent unjust discrimination the carriers should deal with all claims prior to December 1, 1913 and all claims accruing within two years prior to the report of the Commission and filed by April 1, 1914 upon their merits without regard to the period of limitation fixed by the tariff or bill of lading.

57. *Traders' & Travelers' Union v. P. & R. Co.* 1 Int. Com. Comm. R. 371; *Kentucky & Indiana Bridge Co. v. L. & N. R. R. Co.*, 2 Int. Com. Comm. R. 182; *Greenbaum Co. v. C. & O. Ry.*, 25 Int. Com. Comm. R. 352.

58. *A. T. & S. F. Ry. Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St.



to be presented against it and for fifteen months corresponds concerning the claim it cannot thereafter contend the claimant is barred because the claim was not filed in due time. So where

Rep. 685; *Lasky v. Southern Express Co.*, 92 Miss. 268, 45 So. 869; *Howard & Callaghan v. I. C. R. R. Co.*, (Ky.), 171 S. W. 442, 446, 447.

Stipulations in bills of lading covering shipments of live stock, requiring written notice of claim for damages to be given before the stock is removed from the possession of the carrier, are valid, but the requirement that the notice shall be in writing is waived upon proof of actual knowledge of the injury; the rule not being a discrimination between railroads, nor a preference in favor of the particular shipper at the expense of others, violative of the Elkins Act of 1903. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.* (N. C. 1916) 98 S. E. 476.

In an action to recover damages against an initial carrier for injuries to an interstate shipment of cattle, upon a live stock transportation contract containing a stipulation that "no suit shall be brought against any carrier and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof," where such action is not brought within the stipulated time, an allegation in the petition to the effect that by reason of negotiations looking to a settlement of his claim for damages without suit, carried on by means of correspondence between the shipper and certain connecting carriers extending over a period of more than 90

days, shipper was induced to delay bringing action until after the expiration of said time, does not state facts sufficient to constitute an implied waiver of such contractual period of limitation on the part of the initial carrier, especially where it was not informed of such correspondence. *Harrington v. Wichita Falls & N. W. Ry. Co.* (Okla. 1916) 156 Pac. 634.

Though a provision of a contract for the shipment of live stock requiring a notice in writing of any claim for damages to be presented before removal of the stock is valid, it may be waived by the railroad company, and will be considered waived if the company or its agents in charge knew of the damage and injury to the stock at the time they were unloaded at the point of destination. *T. W. Mewborn & Co. v. Louisville & N. R. R.* (N. C. 1915) 87 S. E. 37.

A carrier of live stock was notified of injury to the stock, and its agents notified entered on an examination of the claim, without intimating that a claim in writing was desired. The agents secured the services of a veterinary, and also asked the shipper's consent to kill one of the injured animals, and the shipper replied that, if done, it must be done on the responsibility of the carrier. It was agreed that the question of damage should be taken up for adjustment when the stock reached destination. Held to justify a finding that the carrier waived the stipulation in the con-

the attorney of the carrier discusses and accepts a verbal claim presented to him by the attorney for the claimant, before the expiration of four months, which results in the failure to file a written claim as required by the shipping contract.<sup>59</sup> The theory underlying this line of cases is that by accepting the verbal notice the claimant is lulled into a feeling of security which results in a denial to him of substantial rights if thereafter a written notice is insisted upon. But it seems probable the United States Supreme Court will hold the carrier has no authority to waive any provision in a bill of lading applying to interstate shipments and filed as part of its published tariffs. It has held the effect of a stipulation in a bill of lading for an interstate shipment requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery has elapsed cannot be avoided by suing the carrier in trover on the theory that in making the misdelivery it converted the shipment, and thus abandoned the contract, since the parties could not waive the terms of the contract under which the shipment was made, pursuant to the Interstate Commerce Act, nor could the carrier by its conduct give the shipper the right to ignore the terms and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.<sup>60</sup>

So it has been held that a stipulation that notice of injury to

tract for written notice of damage. *Kolkmeier v. Chicago, & A. R. Co.* (Mo. 1916) 182 S. W. 794.

Where a railroad contracted to transport mules, the contract requiring a written notice from the shipper within one day of any injuries to the stock, and providing that no agent had authority to waive a provision of the contract, but such road, after its station agent's unauthorized action in telling the shipper after injury that it would not be necessary for him to serve a written notice because the station agent himself would notify the company of the condition of

the stock and of the fact that a claim for damages had been made, sent a traveling agent to inspect the mules and failed to disaffirm the action of its station agent, the facts were evidence from which it could be inferred that the station agent's unauthorized act had been ratified. *McElvain v. St. Louis & S. F. R. Co.* (Mo. 1915) 180 S. W. 1018.

Where mules were shipped under a written contract whereby the shipper agreed to give written notice of injury to the shipment within one day, and which provided that no agent of the company might

live stock must be given within five days may be waived by the carrier, but the mere fact that its veterinary surgeon examined the stock and reported the result of his examination to one of its officers was not enough to warrant a reasonable inference of a waiver of the stipulation.<sup>61</sup>

A provision in a livestock contract which provides "that the second party hereby releases and waives any and all cause of action for damages that may have accrued to him by any written or verbal contract prior to the execution hereof," is expressly forbidden by the Elkins Act, declaring it "unlawful for any person, persons, or corporation to offer, grant or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." In the nature of things, damages which accrue from breaches of contracts such as here contemplated are different and vary in amounts. Necessarily what shippers waive in executing such a contract differs on each shipment and on many, if not most, there are no damages to waive. If the contract for carriage exacted more in money or

waive its provisions, and, after injury, he notified the carrier's station agent orally, who told him he would wire the information to headquarters, and who made a written bad-order report to the company and sent it in that day, he complied with the provisions of his contract regarding the giving of notice, despite his testimony that he did not give such notice, since such testimony was a mere conclusion, while the station agent, in noting down the injuries to the

shipments acted as agent for the shipper and his act constituted a giving of notice by him. *McElvain v. St. Louis & S. F. R. Co.* (Mo. 1915) 180 S. W. 1018.

59. *Lynch v. N. Y. C. & H. R. R. Co.* 153 N. Y. S. 633.

60. *Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 36 Sup. Ct. Rep. 541, 542.

61. *Crawford v. Southern R. Co.*, (S. C. 1915), 86 S. E. 19, 20.

62. *J. W. Stewart & Son v. C. R. I. & P. Ry. Co.*, (Ia. 1915), 151 N. W. 485, 487.

property for a like service from one person than from another, this constituted a discrimination, and such is the necessary consequences of inserting this clause in the contract. True, all carriers are required to file copies of contracts for shipment of different classes of freight with the Interstate Commerce Commission, but neither this, nor even the approval of the Commission, lends any sanctity to terms improperly inserted therein and contrary to the provisions of the laws enacted by the Congress.<sup>62</sup> Stipulations in bills of lading, covering shipments of live stock, requiring written notice of the claim for damages to be given before the stock is removed from the possession of the carrier, are valid,<sup>63</sup> but the requirement that the notice shall be in writing is waived upon proof of actual knowledge of the injury.<sup>64</sup> Inferentially this rule has been denied in two cases from the Circuit Court of Appeals (*Kidwell v. Oregon*, 208 Fed. 1, 125 C. C. A. 313; *Clegg v. Railroad*, 203 Fed. 971, 122 C. C. A. 273). These decisions are entitled to high consideration, emanating as they do from courts of learning and ability; but, while they discuss the right to waive the stipulation, neither deals with the effect of knowledge brought home to the carrier before the removal of the stock. The rule permitting knowledge to supply the written notice is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others. It is a mode of proof, applicable alike to all railroads and in favor of all shippers, and it is enforced against a carrier who has had possession of the property, with every opportunity to know the extent of the injury and its cause. There are many well-considered cases that hold the stipulation to be void, because unreasonable, and particularly when the notice is required to be given before the removal of the stock.<sup>65</sup> A provision that notice of claim must be given before the stock

63. *Selby v. Railroad*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *Austin v. Railroad*, 151 N. C. 137, 65 S. E. 757.

64. *Kime v. Railroad*, 153 N. C. 398, 69 S. E. 264; *Kime v. Railroad*, 156 N. C. 451, 72 S. E. 485; *Kime*

*v. Railroad*, 160 N. C. 464, 76 S. E. 509, 43 L. R. A. (N. S.), 617; *Wilkins v. Railroad*, 160 N. C. 58, 75 S. E. 1090.

65. *Baldwin v. Atlantic Coast Line R. Co.*, (N. C. 1915), 86 S. E. 776, 777.

is removed or mingled with others has been recognized as a valid stipulation,<sup>66</sup> and it has been also repeatedly held that the stipulation may be waived by the company, and will be considered waived if the company or its agents in charge had knowledge of the damage and injury to the stock at the time the same were unloaded at the point of destination.<sup>67</sup> The stipulation inserted to protect the carrier from improper or unconscionable claims under circumstances where it would have no means of rebutting proof available, has no natural or necessary connection with or influence upon the rates charged, nor does the principle of waiver, it has been held, have any tendency to create a preference. The rule permitting knowledge to supply the place of written notice "is not a discrimination between railroads, nor is it a preference in favor of a particular shipper at the expense of others. It is a mode of proof, applicable alike to all railroads and in favor of all shippers, and it is enforced against a carrier who has had possession of the property with every opportunity to know the extent of the injury and its cause."<sup>68</sup> A stipulation in a bill of lading or contract of carriage that a claim must be made within a certain time has been held reasonable and valid, and the failure of the shipper to present his claim in writing within the time specified, conclusive of his right to recover.<sup>69</sup> Failure to give notice in accordance with this provision of the contract of carriage, if, specially pleaded and relied upon as a defense casts the burden of proof upon the shipper to show either a compliance with it or a waiver of the requirement by the carrier in order to obtain a recovery.<sup>70</sup> Such a stipulation has been held to be one for the protection of the carrier, which therefore

66. *Duvall v. Railroad*, 167 N. C. 24, 25, 83 S. E. 21, citing *Austin v. Railroad*, 151 N. C. 137, 65 S. E. 757; *Selby v. Railroad*, 113 N. C. 594, 18 S. E. 88, 37 Am. St. Rep. 635.

67. *Kime v. Railroad*, 156 N. C. 451, 72 S. E. 485, 153 N. C. 398, 69 S. E. 264; *Jones v. Railroad*, 148 N. C. 581, 62 S. E. 701.

68. *T. W. Mewborn & Co. v.*

*Louisville & N. R. R.*, 87 S. E. 37.

69. *C. R. I. & P. Ry. Co. v. Williams*, 101 Ark. 436, 142 S. W. 826; *C. R. I. & P. Ry. Co. v. Foster*, 176 S. W. 682.

70. *St. L. & S. F. R. Co. v. Keller*, 90 Ark. 313, 119 S. W. 254; *St. L. & S. F. R. Co. v. Pearce*, 82 Ark. 357, 118 Am. St. Rep. 75, 12 Ann. Cas. 125.

can be waived.<sup>71</sup> It has been held the four months' limitation in the uniform bill of lading may be waived' and that a claim filed with the general claim agent of a carrier at its principal office is sufficient compliance with the provision that notice of loss must be given within four months at point of origin or destination, although not filed there.<sup>72</sup> It may be stated to be the rule therefore, that a carrier which receives a written claim and conducts negotiations without objecting to the settlement of such claim because not made in proper form or presented to the proper agents, waives its right to insist that notice of claim must be made within specified time.<sup>73</sup> And the question of waiver is for the jury.<sup>74</sup>

71. 6 Cyc. 509; *St. L. S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *St. L. I. M. & S. R. Co. v. Shepard*, 168 S. W. 137; *St. Louis, I. M. & S. R. Co. v. Laser Grain Co.*, (Ark. 1915), 179 S. W. 189, 190.

72. *Watson v. Union Pac. R. Co.*, (Mo. 1915), 178 S. W. 871, 872.

73. *St. Louis I. M. & S. R. Co. v. Laser Grain Co.*, (Ark. 1915), 179 S. W. 189, 190.

74. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.*, (Ind. 1915), 108 N. E. 978, 981.

Whether or not there is an implied waiver of a stipulation in a live stock transportation contract between a carrier and a shipper, limiting the time within which action should be sustainable thereunder, is one of fact, to be determined by the jury under proper instructions. *St. Louis, I. M. & S. Ry. Co. v. Patterson*, (Okla. 1916), 156 Pac. 216.

Where there is evidence only

that the irregularity in a notice given was waived, and not that a legally sufficient notice of claim of loss required by the contract of shipment was given, the issue of waiver, and not of the giving of the notice required by the contract, should have been submitted to the jury. *Equity Elevator Co. v. Union Pac. Ry. Co.* (Mo. 1915) 177 S. W. 773.

Where one shipped mules under a written contract whereby, in consideration of a reduced freight rate, he agreed to give written notice of any claim for damage to the stock within one day after delivery, and which provided that no agent of the company had authority to waive any provision of the contract, judgment for injury to the shipment rendered on the theory that there had been a waiver by the station agent of the requirement as to giving written notice could not stand. *McElvain v. St. Louis & S. F. R. Co.* (Mo. 1915) 180 S. W. 1018.

## VIII.

### DAMAGES RECOVERABLE

1. Delay in Transporting.
  - (a) Measure of Damages when no Market at Destination
  - (b) Limitation of Liability.
2. Expense of Tracing Goods.
3. Damages for Partial Loss.
4. Damages for Total Loss.
  - (a) When there is no Market Value.
  - (b) Persons Entitled to Damages.
5. Limitations of Liability—In General.
  - (a) In Case of Fire.
6. Invoice Price Under Bills of Lading.
7. Export and Import Shipments.
8. Goods Hidden From View.
9. Special Damages.
10. Interest on Claims.
11. Baggage.
12. Punitive Damages.

1. **Delay in Transporting.** No more vexatious question arises in the whole field of traffic law than the liability of the carrier for loss or damage arising from unreasonable delay in transit. This is particularly true because the carriers fight such claims more than any others. Many and ingenious have been the devices by which they have sought to escape damages for delay. The carriers are not to blame for scrutinizing claims for delay with extreme care, because such claims are the easiest for the shippers to make and the hardest for the carrier to disprove. In the case of live stock, for instance, it is well known that shippers induce the cattle to drink very freely before transportation. Confined in a close car this water passes thru their bodies with more or less rapidity and thus causes a natural shrinkage. Let the stock train be a trifle late and the live stock shipper im-

mediately puts in a claim for shrinkage. It is for the very reason that there is a shrinkage of this kind naturally going on that the carrier of live stock is held to a strict and expeditious schedule. In the case of extremely perishable produce such as strawberries, which deteriorate very rapidly, if a train arrives a few hours late the carrier has placed itself in a position where it must entertain a claim for damages. It should be noted here with particular reference to what has been said in the foregoing, that a delay of not to exceed a couple of hours may really mean a delay of 24 hours because by reason of this slight delay the shipper may miss a certain market. It is a well known fact that the best markets for perishable produce are over by an early hour in the morning. If a shipment of strawberries arrives just a few hours late, the shipment will have to lay over for the next market, which may mean a total deterioration, or a forced sale to bargain hunters at a considerable loss. The most fruitful source of disagreement on delay claims is the provision of the Uniform Bill of Lading in section 3 which reads as follows: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless specific agreement endorsed hereon." Let a train be several hours late, and miss connections and immediately the freight claim agent will respectfully refer the claimant to this provision of the bill of lading and decline the claim. Yet this section, as a matter of fact, is really meaningless in that it does not change the ruling of the common law, and does not relieve the carrier from liability for failure to promptly transport a shipment. At common law and as a matter of general law throughout the United States it is held the duty of a carrier to transport all goods received with such reasonable dispatch as the character of the goods demand. Now the "character of the goods" means something more than their inherent nature. It does not mean that because brick may not deteriorate for several months the carrier can side track a train load of brick until convenient to haul it. The nature of the use to which the commodity is to be put is of some importance; and the character of the business in which it is to be used,



as well as the method of conducting that business are all matters to be taken into consideration. If brick, for instance, is sold on certain markets and fluctuates in price, it is the duty of the carrier to make those markets with reasonable dispatch. What is a reasonable time for transportation therefore depends upon a variety of considerations distinct from the mere inherent character of the shipment itself. The character of the shipment itself, however, that is, its liability to suffer deterioration during any period of transportation, no matter how short, is of prime importance, and it is for this reason that shipments of live stock and of perishable produce must be transported immediately and as expeditiously as possible. A rush in business does not excuse the carrier for failure to do this, because it is its duty to provide facilities. On the big trunk lines, as a matter of fact, schedules are published under which it is shown that certain trains are supposed to make certain markets at certain times. While the publication of these schedules do not constitute a special contract with the railroad by which the railroad is an insurer to make such markets, as a practical proposition they are almost conclusive evidence before a jury as to what is a reasonable time for the transportation. By referring back to section 3, it will be found that it provides that the carrier is not bound to transport the property by any particular train or any particular market "otherwise than with reasonable dispatch." Now what is "reasonable dispatch" is a question for the jury to determine solely with reference to the facts and circumstances of each particular case. It, therefore, is evident that this provision does not change the general rule. Considering the nature of the goods, it is not reasonable dispatch for a railroad not to transport perishable produce immediately and to fail to reach a market which shippers are in the habit of reaching by a specified time. If a shipment made from the same vicinity makes the market while a shipment on which a claim is filed does not, the carrier certainly is liable whether the delay is one-half an hour or five hours, if damage has actually occurred. While the question has long been settled by the almost unanimous weight of authority in the state courts, the Supreme Court of the United States has not had an opportunity to pass on the question until very recently.

The case of the *N. Y. P. & N. R. R. Co. v. Peninsula Exchange of Maryland*, 36 Sup. Ct. 230,<sup>1</sup> finally settles the disputed question of the correct construction to be given section three. The facts in the case were as follows: On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The property was delivered at destination some hours later than the customary time of arrival and suit was brought to recover damages for failure to make the market. On the ground that by failure to make the market, the railroad did not transport with reasonable despatch, the shipper secured a judgment in the court of appeals of Maryland, 122 Md. 215, 89 Atl. 433. An appeal was taken to the Supreme Court of the United States on two questions, which were as follows: "(1) Does the Carmack Amendment impose on the 'initial carrier' liability for delay occurring on the line of its connection without physical damage to the property? (2) Was the plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon.' The Supreme Court held that under the Carmack Amendment the initial carrier was just as liable for damages due to delay on the line of a connecting carrier as for any other damage. Concerning the second question, that is, liability for failure to meet the market, the court said that it was the duty of the jury to award damages for failure to transport with reasonable dispatch, and if the jury found that it was not reasonable dispatch to make the market on a certain date, they were justified in awarding damages for such failure. The Supreme Court, however, did not directly pass on what would be the correct measure of damages. It appeared that in the trial court a wrong measure of damages had been used,

1. 240 U. S. 34, 60 L. Ed.—

but the case was not reversed on this account, because the state court held that the railroad had not been injured by using the wrong measure of damages, and the Supreme Court of the United States held this aspect of the case involved no federal question. The correct measure of damages in case of a delay in transit which results in a decline in the value of the shipment on arrival, is, under the uniform bill of lading, the difference between the invoice value of the shipment at the time and place of shipment, and the market value of the shipment upon arrival, plus the freight charges if prepaid. Irrespective of the bill of lading, the general rule as to the measure of damages arising from negligent delay by a common carrier in the delivery of goods intended for sale in the market at point of destination is the difference between the market value of the goods when they should have arrived and the value at time of delivery.<sup>1½</sup> So it is said, the measure of damages to a ship-

1½. *Foster v. I. & G. N. Ry. Co.*, (Tex. 1915), 175 S. W. 762, 763.

A shipment of cattle was negligently delayed so that the cattle lost considerably in excess shrinkage. The cattle brought the market price; the only loss suffered by the shipper being the lost weight. Held that, as the measure of damages is the difference between the market value of the stock at the time and in the condition in which they were delivered and their value if delivered in time, the shipper could not, having recovered for shrinkage, also recover for loss in selling appearance, for that would allow a recovery of double damages for the same item. *International & G. N. Ry. Co. v. Rhoden* (Tex. 1915) 177 S. W. 984.

Though the market price was higher on the day the shipment reached the point of destination than on the day it should have reached there, the carrier is not

entitled to a judgment in its favor where the shipper sought recovery, not only for depreciation of the market, but on account of shrinkage of animals by reason of delay. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361, 362.

The measure of damages recoverable by shippers of live stock for delay in transit was the difference in the market value of the cattle on arrival at market and their market value when and in the condition in which they should have arrived, unless the carrier's negligence caused the shipment to be held over for market after arrival. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

In an action by shippers of live stock for delay in transit, where there was no basis in the pleadings for proof of shrinkage in weight after the shipment's late

ment of cattle is the same, irrespective of whether they are shipped for pasturage or to be placed upon the market; that is, the difference between their market price in the condition they were delivered, and what their market price would have been at destination if proper care had been exercised during their shipment. In such cases, however, the carrier has a right to show, if such be the fact, that the cattle, although injured en route, soon thereafter recovered from their injuries, so that the jury could properly estimate the amount of damages sustained.<sup>2</sup> And it has been held in an action for injury to live stock where it is shown that the shipment was in good condition when delivered to the carrier and injured upon arrival at destination, it is proper for the shipper to show their

arrival, or for the decline in the market for which the cattle were held over, the court erred in submitting such matters to the jury, as well as an item for additional feed, as recovery should have been confined to the damages suffered by reason of the shrinkage in weight on account of the cattle's failure to arrive before a time which, though late, was nevertheless early enough to make a market before the one at which they were actually sold. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

Irrespective of any provision which might be in the bill of lading the measure of damages in cases of delay is well stated in *Michie on Carriers*, p. 637, as follows: "That the measure of damages for delay in the delivery of goods by a carrier is the difference between their value when actually delivered and what they would have been worth upon seasonable delivery, is the usual, but not the universal rule. In addition to this difference in market value, the carrier will be liable also for such other and incidental damages as naturally and proximately flow

from the delay, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as the probable result of a breach of it. The carrier is liable for such damages as are the natural result of the delay, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as a probable result of a breach of it. While the carrier is *prima facie* only liable for the natural and ordinary consequences of the breach of contract by delay; but where, at the time of entering into the contract, both parties knew and contemplated that if such breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the carrier will be liable to give compensation or damages on the occurrence of the injury.

*T. M. Ry. Co. v. King*, (Tex. 1915), 174 S. W. 336, 337; *T. & P. Ry. Co. v. Martin Bros.* (Tex. 1915) 175 S. W. 707, 708; *Rogers v. T. & P. Ry.*, (Tex. 1914), 172 S. W. 1117, 1119.

2. *Houston & T. C. R. Co. v. Lindsey*, (Tex. 1915), 175 S. W. 708, 709, 710.

market value at destination although there was no evidence to show what the condition at destination would have been if they had been transported with ordinary care.<sup>3</sup> So where a shipment of cattle was improperly handled in transit and part of the cattle was sold in one market and part in another market at another town, evidence of what the cattle would have been worth at one of the markets had they been properly handled is admissible as to the cattle sold there.<sup>4</sup> In order to establish a market value at the place of delivery it is necessary to show that like cattle had been bought and sold there in sufficient quantity and often enough to establish a market value.<sup>5</sup> So it has been said that if from the market value of a commodity at destination the freight to that point, added to the cost of converting the commodity into cash, be deducted, the resulting balance will show with reasonable certainty the value of the commodity at the point from which the shipment moved.<sup>6</sup> On the other hand it has been stated that a carrier is, strictly speaking, not an insurer at all, but a bailee for hire which, in that capacity, has statutory as well as common-law obligations for the safety of property committed to its charge. Cases may arise where elements other than the amount of damages which might be recovered, as, for example, the degree of care required and the value of the service to the shipper, would have a substantial bearing upon the reasonableness of rates graded according to value, as well as of other rates.<sup>7</sup> Stock should reach the market in time to be watered and fed before being offered for sale, and hence, where there was no time for this before the market closed after the delivery at destination on the day the cattle were to be sold, the carrier was liable for loss due to decline in the market on the following day.<sup>8</sup>

3. *Kansas City M. & O. Ry. Co. v. Cave*, (Tex. 1915), 174 S. W. 872, 873.

4. *T. & P. Ry. v. Graham & Price*, (Tex. 1915), 174 S. W. 297, 298.

5. *G. H. & S. A. Ry. Co. v. Patterson*, (Tex. 1915), 173 S. W. 273, 274.

6. *Lamb v. W. H. Mitchell & Co.*, (Ga. 1915), 84 S. E. 213.

7. *Iowa Railroad Commissioners v. A. T. & S. F. Ry. Co.*, 36 I. C. C. 79, 84.

8. *Railway Co. v. White*, 120 S. W. 1128; *Railway Co. v. Wells, Nash & Nash*, 153 S. W. 659; *Texas Midland R. R. v. Becker & Cole*, 171 S. W. 1024. *Texas Midland R. R. v. Fogleman*, (Tex. 1915), 172 S. W. 560.

Where a shipment of beans spoiled as a result of the negligent delay of the carrier, is sold by it and the proceeds retained by it and the only measure of damages appearing in the case is the invoice price of the same at the place of delivery, such price may be taken as the correct measure of damage.<sup>9</sup> If a carrier's agent made an emphatic and positive statement to a shipper who was tracing his goods that the shipment was lost, and could not be found, that induced the shipper to act on this assertion, and he did, and procured other goods, then it was for the jury to determine whether he had been damaged under the particular circumstances. It is true, where goods reach their destination in a damaged condition, it is the duty of the consignee to receive and sell them at the nearest market price, deduct the amount from the value of the goods, and file a claim against the carrier for the balance; but where the value of the goods in their damaged condition is so small that it would be probably consumed in the handling, a judgment for their full value may be sustained.<sup>10</sup> So where the consignee of household goods has been informed that such goods have been lost in transit and thereupon purchases new goods, it is a question for a jury to say whether upon the original shipment being discovered and tendered to the consignee, he has a right to refuse to accept it since the amount such goods did bring would be too small to justify the handling of them.<sup>11</sup> Where by terms of a contract goods were sold "Draft with B. L. payable upon arrival and examination of goods," it follows that, the seller having consigned the goods to shipper's order, and having neither endorsed nor transferred the bill of lading to the buyer, and the draft being made payable after the arrival and examination of the goods, the latter did not have any title to the goods until the conditions prescribed by the seller had been complied with by it. The goods having been delayed in transportation for an unreasonable length of time, under

9. *Lyons v. Grand Trunk Ry. Co. of Canada*, (Mich. 1915), 152 N. W. 88, 89.

10. *McGrath Bros. v. C. & W. C. Ry.*, 91 S. C. 552, 75 S. E. 44, 42 L. R. A. (N. S.), 782, Ann. Cas.

1914 A, 64; *Givens v. Seaboard Air Line Ry. Co.*, (S. C. 1915), 86 S. E. 24, 25.

11. *Givens v. Seaboard Air Line Ry. Co.*, (S. C. 1915), 86 S. E. 24, 25.

this provision of the contract the buyer had a right to rescind the contract of sale, and the remedy of the seller or consignor should have been against the railroad company for its failure to deliver the goods within a reasonable time.<sup>12</sup> A shipper of cotton suing for unreasonable delay in transportation, who ordered cotton to be compressed in transit, has the burden of showing that the delay was not due to the compression of the cotton.<sup>13</sup> And where he relies on the regulation of a State Railroad commission that cotton can not be held longer than five days for compression, must offer such regulation in evidence, as the state courts will not take judicial notice of it.<sup>14</sup> Before a terminal carrier can be held for damages for delay, the claimant must show that the delay complained of was due to the default of such carrier. The fact that the initial carrier was guilty of delay does not raise the presumption that the terminal carrier was similarly in default.<sup>15</sup> And a verdict of a jury holding a carrier guilty of negligence by unreasonable delay will not be set aside by the trial court where the facts are in dispute.<sup>16</sup> It is the settled law in some states that as soon as a vendor delivers property to a carrier consigned to a vendee the title passes to the vendee, and for any delay in shipment the vendee's remedy is against the carrier.<sup>17</sup> But a suit for unreasonable delay in the transportation of cotton is not well founded where it appears that the cotton is worth more on arrival at destination than it would have been worth at the time it should have arrived.<sup>18</sup> Sometimes loss happens to goods other than perishable pro-

12. *Cochran v. Chetopa Mill & Elevator Co.*, 88 Ark. 343, 114 S. W. 711; *Isbell-Brown Co. v. Stevens Grocer Co.*, (Ark. 1915), 175 S. W. 1158, 1159.

13. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Texas 1915), 178 S. W. 810, 813.

14. *Stevens & Russell v. St. Louis Southwestern Ry. Co.*, (Texas 1915), 178 S. W. 810, 813.

15. *Southern Ry. Co. v. Renes* (Ala. 1915), 68 So. 987, 989.

16. *Cincinnati, N. O. & T. P.*

*Ry. Co. v. Myers*, (Ky. 1915), 178 S. W. 1038.

17. *Brownfield v. Dudley E. Jones Co.*, 98 Ark. 495, 136 S. W. 664; *Roberts Cotton Oil Co. v. Grady*, 105 Ark. 53, 150 S. W. 150; *Templeton v. Equitable Mfg. Co.*, 79 Ark. 456, 96 S. W. 188, 116 Am. St. Rep. 88; *Isbell-Brown Co. v. Stevens Grocer Co.*, (Ark. 1915), 175 S. W. 1158, 1159.

18. *Stevens & Russell v. St. Louis Southwestern Ry. Co.*, (Texas 1915), 178 S. W. 810, 814.

duce or live stock because of delay in transportation. So it has been stated that the reasonable value of the use of household goods may be recovered as an element of damage for delay in transportation.<sup>19</sup>

Where a carrier unreasonably delayed in transit an automobile engine sent to a factory for repairs, the shipper is entitled to recover the fair rental value of such engine during the unreasonable delay.<sup>20</sup> With relation to other shipments it has been held the measure of damages for an unreasonable delay is the difference between the value of the property shipped when delivered and when it should have been delivered.<sup>21</sup> When there is no difference in the intrinsic value of the property on the two dates, but only a loss of the value of the use of the article shipped, viz., its rental value, unless the claimant is entitled to recover for loss of prospective profits, his recovery would be nominal.<sup>22</sup>

#### 1. (a) Measure of Damages When No Market at Destination.

However, cases arise where there is no market at original destination but the shipment must be diverted to another market. In an action for loss and damages to a shipment of peaches, diverted at original destination, it was contended that the verdict was excessive, for the reason that Burlington was the point of destination, and the condition of the market there should be the sole test. There was no market for the peaches there and owing to improper icing the shipment could not stand a further journey. It was said the shipper was entitled to recover an amount which would compensate him for the difference between what he would have realized for the peaches at the point of destination, if the car had been

19. *L. & N. R. Co. v. Cheatwood*, (Ala. 1915), 68 So. 720, 722.

20. *Armstrong v. C. M. & St. P. Ry. Co.*, (S. D. 1915), 152 N. W. 696, 697.

21. *Sherman v. Hudson R. R. Co.*, 64 N. Y. 254; *Katz v. Cleveland C. & St. L. R. R. Co.*, 46 Misc. p. 259, 91 N. Y. Supp. 720; *Bus-*

*sey v. Memphis & Little Rock R. Co.*, (C. C.), 13 Fed. 330; *Milne v. Douglass (C. C.)*, 17 Fed. 482; *In re Petitions of Peterson*, (C. C.), 21 Fed. 885; *Central Trust Co. v. Savannah & W. R. Co.*, (C. C.), 69 Fed. 683.

22. *Detmer-Wallen Co. v. D. L. & W. R. Co.*, 153 N. Y. S., 288, 289.



properly iced, less the market value in the damaged condition. Treating Burlington as the point of destination, it does not necessarily follow that the state of that market on the date the peaches reached there was the sole test, for if there was no satisfactory market there the shipper was entitled to carry his products to some other available market.<sup>23</sup> The mere fact that the Burlington market was in such condition that the fruit could not have been advantageously disposed of, even if it reached there in good condition, does not deprive the shipper of the privilege of taking the fruit to another market, which would have been available to him if the car had been properly iced so as to stand a longer journey. It is unimportant whether there was a contract for the diversion of the car or not, for the reason that the shipper had the right to reship his stuff from Burlington, so as to reach a better market. It is said the real question in the case, so far as the amount of damages is concerned, is whether or not the car of fruit would have reached the best available market if it had been properly iced, and whether or not the failure of the carrier to ice the car according to the contract had deprived the shipper of that market. If it did, then he is entitled to the difference between the market value of the fruit in the condition in which it would have been if it had been properly iced, and the market value in its damaged condition.<sup>24</sup>

23. *St. Louis I. M. & S. Ry. Co. v. Tilby*, (Ark. 1915), 174 S. W. 1167, 1170. And see, *Grand Tower Ry. Co. v. Phillips*, 23 How., (U. S.), 471.

24. *St. Louis, I. M. & S. Ry. Co. v. Tilby*, (Ark. 1915), 174 S. W. 1167, 1170.

In an action against an express company for delay in transporting a piano for a showman, the shipper's testimony as to the difference in his earnings at C., to which the piano was shipped, without it, and the average earnings in towns of

approximately the same size and under the same conditions as C., was admissible to show actual damages. *Piero v. Southern Express Co.* (S. C. 1916) 88 S. E. 269.

The general rule is that in case of a loss of the goods the measure of damages recoverable by the shipper is the market value of the goods at point of destination, with interest from the time they should have been delivered, less the amount of the freight charges due for their transportation.

*Railway v. Portrait Co.* (Ga. 1905), 49 S. E. 727.

1. (a) **Limitation of Liability in Case of Delay.** It has been held that a limitation in the bill of lading, whereby the shipper waives

Railway v. Supply Co. (Ga. 1906)  
54 S. E. 530.

Blackmer v. The Railway (Mo.  
1903), 73 S. W. 913.

Railway v. Rines & Co. (Tex.  
1905), 84 S. W. 1092.

Railway v. Dougherty, 7 App. D.  
C. 378.

Silverman v. Railway, 26 So. 447.

Armistead v. Railway, 32 So. 456.

Peterson v. Railway, 103 N. W.  
621.

Railway v. Dishman, 85 S. W. 319.

Railway v. Stock & Sons, 51 S.  
E. 161.

Ency. of Law & Procedure, Vol.  
5, p. 373, et seq.

Hutchinson on Carriers, 3rd Ed.,  
Sec. 1360.

Moore on Carriers, 2nd Ed., p.  
592.

If there is no market at the place where the goods are to be delivered, their value at the nearest market less the cost of transportation thereto, is to be taken as the measure of the shipper's recovery.

Ency. of Law & Procedure, Vol.  
5, p. 375 et seq. et 381, and  
cases cited.

When the goods are merely damaged and all are delivered in the damaged state, the measure of damages is the same as in case of a total loss, except that the carrier is entitled to have deducted the fair value at the time and place of delivery of the goods in their damaged state.

Ency. of Law & Procedure, Vol.  
VI. 5, p. 382.

Hutchinson on Carriers, 3rd Ed.,  
Sec. 1362.

The United States Supreme Court in *The Queen of the Pacific*, 180 U. S. 49, held that goods sold by auction in a great mart of commerce is a proper method of determining the value of goods damaged in the hands of a carrier. Furthermore, not only is the measure of damages the market value at the nearest available market, but it must be for the goods in the quantities sold.

Grand Tower Co. v. Phillips, 23  
How 471.

Kilpatrick v. Whitmer & Sons,  
118 App. Div. N. Y. 98.

Stecker v. Weaver Coal & Coke  
Co., 116 App. Div. N. Y. 773.

Wehle v. Haviland et al, 69 N.  
Y. 446.

Marshall v. Clark, 78 Conn. 11.

Johnson & Thornton v. Allen &  
Jemison, 78 Ala. 382.

Hewson-Herzog Supply Co. v.  
Minn. Brick Co., 57 N. W. 129.

Tuttle Chapman Co. v. Coaldale  
Fuel Co., 113 N. W. 827.

Yellow Poplar Lumber Co. v.  
Chapman, 74 Fed. 444.

O'Gara v. Ellsworth, 83 N. Y. S.  
121.

Railway v. Payne, 38 S. W. 366.

In *Grand Tower Company v. Phillips*, 23 Wall 471, the court said, page 480:

"The true rule would seem to be to allow the plaintiffs to show

the right to claim damages for delay in a shipment of livestock occurring before the execution of the contract, is valid.<sup>25</sup>

**2. Expense of Tracing Goods.** Since questions sometimes arise as to whether the expense of telegraphing for goods and tracing them in various ways can be received as damages, it may be of interest to note a recent case. In this case it was stated that where goods have not been lost or destroyed during transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and as they should have been delivered, and with such other damages as have naturally and proximately resulted from the injury. Under the latter head, the owner would be entitled to recover for reasonable expenses in seeking to reclaim the goods, or in restoring them to their former condition, or endeavoring to reduce the loss to its lowest amount. And interest could be allowed by the jury. If the goods had been restored to their original value by the repairs, the measure of damages would, of course, be the reasonable cost of the

the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling, if any, would be the true measure of damages."

25. *Cox v. St. L. & S. F. R. Co.* (Mo. 1915), 174 S. W. 127.

Where, in an action against a carrier for negligent delay in an interstate shipment of live stock, it is shown that the shipment was under a special written contract signed by the shipper and based

upon a reduced rate, made in consequence of the terms of such contract, and that such rate had been published and filed with the Interstate Commerce Commission, in accordance with the federal laws and the regulations of such Commission, held, that in the absence of proof of such fraud, oppression, attempted rebating, or unlawful billing, as would avoid the contract, that the terms of such contract governed the liability of the carrier, and that the failure by the shipper to comply with certain provisions thereof where such provisions are not shown to be unreasonable in the particular case, will avoid the liability of the carrier. *St. Louis & S. F. R. Co. v. Taliaferro* (Okla. 1915) 156 Pac. 359.

repairs; if not fully restored, then the reasonable cost of repairs plus the difference in value of the articles as restored and their original value.<sup>26</sup> But in an action for damages for delay in the delivery of a trunk, there can be no recovery for expenses incurred in tracing the trunk, without evidence from which it can be inferred that such expenses were reasonable or necessary.<sup>27</sup>

**3. Damages for Partial Loss.** It may be stated as a rule which has very generally received judicial approval, that where there is a partial loss to a shipment shipped under an agreed valuation, the carrier is always liable for such loss up to the agreed value even if the shipment in its entirety as damaged is worth more than the limited liability. Thus the stipulation in a contract of live stock shipment that the value of each animal does not exceed \$100, and the carrier's liability for any loss or damage shall not exceed such valuation, does not prevent recovery where an animal is after its injury worth \$100, but merely limits to such amount the recovery of damages measured by the ordinary rule of difference in market value with and without the injury.<sup>28</sup>

26. *H. W. Little & Co. v. A. C. L. R. Co.*, (N. C. 1915), 85 S. E. 18, 19.

But such expenses must be alleged and paid. 6 Cyc. 452. *Southern Ry. Co. v. Webb*, 143 Ala. 304, 39 S. 262, 111 Am. St. Rep. 45, 5 Ann. Cas. 97; *L. & N. R. R. Co. v. Cheatwood*, (Ala. 1915), 68 So. 720, 721.

28. *Illinois Cent. R. Co. v. H. E. Wilson & Co.*, (Tenn. 1915), 176 S. W. 1036; *N. & W. Ry. v. Steele* (Va. 1915) 86 S. E. 124; *Ficklin v. Washash Co.* 117 Mo. App. 211, 93 S. W. 861; *Starnes v. L. & N. Ry.* 21 Tenn. 516, 19 S. W. 675; *C. of Ry. v. Broada*, (Ala. 1914), 67 437.

Under a contract for the carriage of cattle limiting the carrier's liability to the valuation declared by

the shipper, the rate charged being based on such valuation, the liability was not based on such valuation, but only limited to such valuation, and the measure of damages was the amount of actual damages from the carrier's negligence, in no case to exceed the sum stipulated. *Greening v. Chicago & N. W. Ry. Co.* (Mo. 1916) 183 S. W. 1121.

Where bill of lading for an interstate shipment of live stock, in consideration of reduced rate, limited the liability of the carrier to \$100 for each horse or mule, such limitation does not, where horses and mules were injured, preclude recovery of damages, although the animals, despite the injury, were worth more than \$100 a head. *Washington Horse Exchange v.*

**4. Measure of Damages for Total Loss.** A common carrier is an insurer of inanimate freight, save against the act of God or the public enemy, and is an insurer, too, with respect to live stock in his custody for transportation, save against the act of God, the public enemy, the carelessness of the shipper, or the vicious propensities of the animals themselves. This being true, the carrier is required to deliver the goods intact, except as above stated, and in event of his failure he is required to respond for such value (and interest in some States) thereon from the time the delivery should be made at the point of destination. This is true, too, where the goods have not been lost or destroyed, but are delivered only in a depreciated condition attributable to causes for which the carrier is responsible. Even in such cases the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and as they should have been delivered, including interest if allowable under the state law.<sup>29</sup>

Louisville & N. R. Co. (N. C. 1916) 87 S. E. 941.

A contract of shipment of live stock, agreeing that the value of the live stock should not exceed \$30 per head, and that in no event should the carrier's liability exceed \$1,000, permits the shipper to recover actual damage up to the amount named, and not merely the proportion of the amount named which the damage bears to the actual value of the stock. *Castner v. Oregon-Washington R. & Nav. Co.* (Wash. 1916) 155 Pac. 167. *Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston* (Ky. 1915) 176 S. W., 1013, 1014.

But it also has been held that under a contract for interstate carriage of horses, conditioned, in consideration of the lower tariff, that the carrier assumed liability to the extent of the recited agreed

valuation, the shipper is not entitled to recover the entire loss, because less than the amount limited nor is the carrier free from liability because the horses in their injured condition are worth more than the agreed valuation, but the shipper is liable for such proportion of the actual loss as the declared valuation bears to the actual value. *Frank v. Michigan Cent. R. R. Co.*, 154 N. Y. S., 701. And see *Duplon Silk Co. v. L. V. R. R.* 223 Fed. 600.

27. *Lichterman v. Barrett*, 157 N. Y. S. 882, 883.

29. 3 *Hutchinson on Carriers*, (3rd Ed), 1362; *Humphreys v. St. Louis & G. Ry. Co.*, (Missouri 1915), 178 S. W. 233, 236.

The measure of damages for injury negligently inflicted on live stock during transportation is the market value at the place of delivery of those killed or rendered

4. (a.) **When There is no Market Value.** The measure of damages for the failure of a common carrier to deliver goods is the value of the goods at the time and place of destination in the condition in which they should have been delivered, and the owner is entitled to recover such value, less the charges for transportation and delivery.<sup>30</sup> However, under section three of the Uniform Bill of Lading the measure of damages is the invoice price to the consignee at the time and place of shipment.<sup>30½</sup> But in the absence of a market value for a shipment, its intrinsic value would be the proper measure, and in such case evidence of the price paid therefor would be admiss-

worthless, and the measure of damages for those injured, but not killed or rendered worthless, is the difference between their market value as delivered and what it would have been had they been handled with proper care. *Hovencamp v. Union Stockyards Co.* (Tex. 1915) 180 S. W. 225.

In an action brought against the carrier at the point of destination for the loss of goods destroyed after acceptance at the place of shipment, the measure of damages is properly the value of the goods at destination. *Canadian Pac. Ry. Co. v. Wieland*, 226 Fed. 670.

In an action for injury to a shipment of live stock, the measure of damages is the difference between the market value of the animals upon their arrival at destination and what would have been their value at the destination, had they been transported with ordinary care and dispatch. *Texas & P. Ry. Co. v. De Long* (Tex. 1915) 176 S. W., 874.

Where, in an action against a stockyards company for negligent injury to stock, the undisputed ev-

idence showed that some of the animals were badly injured and some in a dying condition when received by defendant, the measure of damages, except as to those which died, was the difference between the market value at destination in the condition they were in when received by the stockyards company from the railroad company and the market value when delivered to plaintiff, and, as to those which died, the stockyards company, though not liable for those dying as the proximate result of injuries inflicted during transportation, being liable for the market value at destination of those dying from its own negligence. *Hovencamp v. Union Stockyards Co.* (Tex. 1915) 180 S. W. 225.

30. *Meek v. U. P. R. Co.*, (Kans. 1915), 147 Pac. 1112.

The measure of damages for injuries to cattle shipped for pasturage is the same as for injuries to those shipped to market for sale. *Pecos & N. T. Ry. Co. v. Holmes* (Tex. 1915) 177 S. W. 505.

30½. *Coleman v. N. Y. N. H. & H. R. R. R.*, (Mass. 1913), 102 N. E. 92, 94.

ible as a circumstance to be considered in determining such value.<sup>31</sup> Therefore in an action to recover for the loss of an article which had no market value, the measure of damages should be the value of the article to the plaintiff, and, in ascertaining this value, inquiry may be made into the constituent elements and the cost to the plaintiff of producing the article. Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual

31. *G. H. & S. A. Ry. Co. v. Patterson*, (Tex. 1915), 173 S. W. 273, 274.

In an action for injuries to a shipment of horses, evidence of their actual value at the point of destination is admissible, where it did not appear that they had any market value at such point. *Texas & P. Ry. Co. v. McMillen* (Tex. 1916) 183 S. W. 773.

In such case, evidence that the shipment had a good run after being delivered by defendant to the connecting carrier is admissible tending to show that the loss occurred while the horses were in defendant's custody. *Texas & P. Ry. Co. v. McMillen* (Tex. 1916) 183 S. W. 773.

In such case, though the defendant railroad company limited its liability to damages occurring on its own line, and though the shipment was an interstate one, it was liable for damages caused by its negligence, though such damages did not develop until after the ani-

mals were delivered to the connecting carrier. *Texas & P. Ry. Co. v. McMillen* (Tex. 1916) 183 S. W. 773.

Where hogs died in transit, the measure of damages is their market value at point of destination, or, in case there was no market value, their intrinsic value at such point. *Southern Kansas Ry. Co. of Texas v. Hughey*, (Tex. 1916) 182 S. W. 361.

In an action against a carrier for the conversion of freight, evidence as to the condition and value of the property when it was stored with a furniture company four months before shipment and eight months before the conversion, and that the goods were so well crated and packed that the carrier waived its usual rule requiring payment of freight in advance, is sufficient to raise the presumption that the value continued the same at the time of conversion as at the time of storage. *Whitley v. Gulf C. & S. F. Ry. Co.* (Tex. 1916) 183 S. W. 36.

in its character that market value cannot be predicated of it, its value, or the claimant's damages, must be ascertained in some other rational way, and from such elements as are attainable.<sup>32</sup> And where damage is certain, but the amount is uncertain, a recovery may be had, including loss of prospective profits, although the amount of such loss is uncertain.<sup>33</sup> So a mechanic who has constructed a model plow on which he had secured a patent and which had no market value, can recover from a carrier which had lost the same in transit, the value of the materials furnished and the work done by others on the model.<sup>34</sup> In determining damages for the conversion of freight by a carrier, secondhand household fixtures are regarded as having no recognized or fixed market value, but the court should consider the original cost of the property, the manner in which it has been used, its general condition and quality, its age, etc.<sup>35</sup>

**4. (b.) Persons Entitled to Damages.** Some questions have arisen as to who is entitled to maintain an action for loss to a shipment. The courts have held that the consignee is *prima facie* entitled to maintain such action, also that a commission merchant who has such goods for sale has such an interest in them as entitles him to bring suit. Of course, the owner always has this right.

**5. Limitation of Liability in General.** For many years, if not, indeed, from the origin of railroad transportation in this country, common carriers by railroad have sought, by provisions in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tort-feasors for loss or damage caused by their negligence. One method was by a so-called release, executed by shipper and carrier, and intended to be effective whether the loss or damage was due to negligence of the carrier or to other causes. The courts in different jurisdictions have differed as to the validity of such limitations and they have been the subject of legis-

<sup>32</sup> *St. L. I. M. & S. Ry. v. Dague*, (Ark. 1915), 176 S. W. 138, 139.

<sup>33</sup> *Detmer-Wallen Co. v. D. L. & W. R. Co.*, 153 N. Y. 287, 289.

<sup>34</sup> *St. L. I. M. & S. Ry.*, (Ark. 1915), 176 S. W. 138, 139.

<sup>35</sup> *Whitley v. Gulf, C. & S. F. Ry. Co.*, (Tex. 1916) 183 S. W. 36.



lation in some of the states. By adoption of the "Carmack Amendment," so called, to the act to regulate commerce, approved June 29, 1906, Congress provided that a common carrier receiving property for transportation from a point in one state to a point in another state should issue a receipt or bill of lading therefor and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, or over whose lines such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. It was provided that nothing in that amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had at that time under existing law. Since that time, beginning in 1913, with *Adams Express Co. v. Croninger*, 226 U. S. 491,<sup>35½</sup> the Supreme Court of the United States has decided in a number of cases, all of which followed *Hart v. P. R. R.*, 112 U. S. 331, that where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability, and in "a fair, just, and reasonable agreement" declares or agrees that the value of his shipment is a certain sum and thereby secures a reduced transportation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss of or damage to the property, and conclusively presumed to have known the governing tariff. On March 4, 1915, the following act, amendatory of the act to regulate commerce, and called the Cummins amendment, was approved: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that so much of section seven of an act entitled "An act to amend an act entitled, 'An act to regulate commerce,'" approved February 4th, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, reads as follows, to-wit: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another State shall issue a receipt or a

bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such pro-

perty may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void; Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

"Sec. 2. That this Act shall take effect and be in force from ninety days after its passage."

Many widely varying or diametrically opposed ideas have been expressed as to the effect of this amendment and as to what would be the lawful rates under tariffs when it became effective on June 2, 1915. The Interstate Commerce Commission was urged to some expression in the premises. It held a hearing on

this subject and the questions there discussed were argued on briefs. From the best information it was possible to obtain the Commission expressed tentatively certain views. The greater part of the freight transported moves under a bill of lading, which constitutes a receipt for the property and a contract for its carriage. Efforts have been made from time to time to secure the adoption and use by all carriers of a uniform bill of lading, but no such effort has been entirely successful. Several years ago protracted effort of that kind, assisted in so far as seemed appropriate by the Commission, culminated in substantial agreement among the representatives of the shippers and the representatives of the carriers, excepting those in the southern classification territory, as to the terms and conditions of what was then styled and has since been known as the uniform bill of lading. The Commission gave it tentative approval and recommended its use, and since that time it has been in use except in the southern territory mentioned, where a somewhat different bill of lading, commonly called the standard bill of lading, has been and is in use. The official classification, which, speaking generally, applies in the territory east of the Mississippi River and north of the Ohio and Potomac rivers, contains a rule that, except as otherwise provided, when property is transported subject to the provisions of that classification the acceptance and use of the uniform bill of lading, export bill of lading, uniform live-stock contract, and certain contracts with men in charge of shipments, respectively, are required. The uniform bill of lading and the other bills of lading or contracts are set out in full in the classification. Another rule is that in order that the consignor may have the option of shipping subject to the terms and conditions of the uniform bill of lading, or under the liability imposed upon common carriers by the common law and the federal and state statutes applicable thereto, different rates and different forms of bills of lading are provided, to be used at the election of the shipper. Under this rule, unless it is otherwise provided in the classification, property will be carried at the lower rates specified if shipped subject to all the terms and conditions of the uniform bill of lading. Property carried not subject to all the terms and conditions of the uniform bill of lading is to be carried at the carrier's liability, limited only as provided by common

law and by the laws of the United States and of the several states is so far as they apply, but subject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability, and in such instances a rate 10 per cent higher, subject to a minimum increase of 1 cent per 100 pounds, will be charged. It is provided that if the consignee elects not to accept all the terms and conditions of the uniform bill of lading he shall so notify the agent of the carrier at the time his property is delivered for shipment, and if he does not give such notice it will be understood that he desires the property carried subject to the terms and conditions of the uniform bill of lading in order to secure the lower rate or, as it is termed in the classification, "the reduced rate." If the shipper notifies the agent of the initial carrier that he elects not to accept all the terms and conditions of the uniform bill of lading the agent must print, write, or stamp upon the bill of lading a provision that in consideration of the higher rate charged the property will be carried at the carrier's liability, limited only as provided by law, but subject to the terms and conditions of the uniform bill of lading in so far as they are not inconsistent with such common carrier's liability. The western classification, which, speaking generally, applies in all of the territory west of the Mississippi River and Lake Michigan, contains a rule that, except as otherwise provided therein, when property is transported subject to the provisions of the western classification the acceptance and use of the uniform bill of lading is required. It also contains additional provisions substantially like those cited from the official classification. All of the terms of the uniform bill of lading are printed in the classification, but the livestock contract form does not so appear. The livestock ratings are stated to be based upon values declared by shippers, not exceeding certain stated values "under contract." The southern classification, which, speaking in general, applies in the territory east of the Mississippi and south of the Ohio and Potomac rivers, contains a rule that the reduced rates specified in the classification will apply only on property shipped subject to the conditions of the carrier's bill of lading, and that property carried not subject to the conditions of the carrier's bill of lading will be at the carrier's liability, limited only as provided by common law and by

the laws of the United States and of the several states in so far as they apply. It provides that property thus carried will be charged 10 per cent higher, subject to a minimum increase of 1 cent per 100 pounds, than if shipped subject to the conditions of the carrier's bill of lading. The classification does not contain the terms of the carrier's bill of lading, and, with one or two individual exceptions, the terms thereof are not filed with the Commission as a tariff publication or rate schedule. The classification provides that the rates on live stock will apply when the declared value does not exceed certain values therein stated and that for each increase of 100 per cent or fraction thereof in the declared value there shall be an increase of 20 per cent in the rate. The classification does not contain any requirement that the livestock contract must be used, but it does provide that agents must not issue more than one live-stock contract on any one shipment. Some of the tariffs of the individual carriers in this territory contain released rates applicable to shipments of live stock which are conditioned upon certain declared valuations and upon shipments being made under the livestock contract, and such tariffs provide that higher rates will apply when shipments are not so made. The terms of the livestock contract are not incorporated in the tariffs and, with one or two individual exceptions, they are not filed with the Commission as a tariff publication. It is perfectly plain that the purpose of the Cummins Amendment is, except as otherwise provided therein, to invalidate all limitations of carrier's liability for loss, damage, or injury to property transported caused by the initial carrier or by another carrier to which it may be delivered or which may participate in transporting it. The law does not specifically say that attempts so to limit the carrier's liability shall not be resorted to, but it declares them to be invalid and unlawful wherever found and in whatever guise they may appear. Obviously, therefore, neither the bills of lading or other contracts for carriage, or classifications or rate schedules of the carriers' should contain any provisions which are so declared to be unlawful and void. Some of the carriers insisted that if no changes were made in their classifications and other tariff publications the lower rates which were conditioned upon the use of the bills of lading then in use, would be automatically canceled and

the higher rates, based upon the carrier's liability, be the only lawful rates from and after the date upon which the law in question became effective. Some of the shippers insisted that if no changes were made in the classifications or tariff publications, the provisions for limitation of carrier's liability would, when the new law became effective, be unlawful and void, and the carriers thereupon have two sets of rates, both applicable under like conditions, and that of the two the shippers would be entitled to the lower. The official classification roads have announced the purpose of making certain changes in the terms of their bill of lading, other contracts of carriage, and classification and rate schedules, in the light of the provisions of the new law. They said that whether or not they would continue to maintain rates based upon the value of the property was a matter for further consideration by their traffic officers. They expressed the opinion that certain of these changes would impose upon them liabilities not theretofore borne and consequent loss of revenue, and reserved the right to assert at the proper time a claim for some increase in rates on account thereof. The southern lines announced their purpose of making certain changes in their contracts, classification and rate schedules which would exempt certain heavy commodities moving in large quantities and said to constitute about 70 per cent of their traffic from any immediate increases in rates on account of the amended law, and to incorporate in the classification a provision that as to the remainder of the traffic the rates contained in schedules governed by the classification would be increased 5 per cent upon the date when the new law became effective. That method of changing rates would be in direct opposition to the Commission's regulations governing the construction of tariffs, which are by the act given full force of law. The southern lines urged that the new law would produce conditions which furnished substantial reasons for allowing them additional revenue, and that it was physically impossible, except by the method which they proposed, to issue any tariff publications prior to June 2nd, 1915, which would secure that additional revenue. They claimed that the tariff regulations were prescribed by the Commission and that it was within its power to modify

them at any time, and therefore the question of whether or not the carriers should be permitted to make effective the proposed plan was wholly within the Commission's discretion to determine. They argued that if nothing was done the 10 per cent higher rates would automatically become effective, which they did not desire, and that the course proposed by them was the only alternative to the injustice of their being compelled to sustain the burdens imposed by the new legislation without means for recouping the losses which they would suffer. The Commission had made no investigation upon which a judgment as to the cost of and proper compensation for additional risk could be based. The Commission had no right to assume that it would be 5 per cent of the rates upon 30 per cent of the carriers' traffic or that it would be any given per cent upon all of the traffic. Obviously there could be no propriety in attaching to one commodity unreasonable rates for the purpose of compensating a carrier for a risk attaching to it in the transportation of another commodity, and it was admitted that the carriers could not make any accurate statement in advance as to the added cost, if any, of the increased liability. With regard to rates on shipments of live stock, the southern carriers announced at the hearing their purpose to provide that the present rates would apply on shipments declared to be of a value not exceeding that then stated as limitation of carrier's liability, and to increase the rates 20 per cent for each 100 per cent increase in the declared value of the live stock. They also announced the purpose to provide for an increase of 5 per cent in the rate for each increase of 100 per cent, or fraction thereof, in the declared value. Still later the southern classification roads advised that, in view of the numerous and irreconcilable complications which developed, and in order to remove all doubt as to the continuance of existing rates after the amendment to the law became effective, they had decided to supersede their present classification rule by one which would recite that the rates governed by the classification would apply only on property shipped subject to the conditions of the carrier's bill of lading in use on and after the effective date of the amended law, and, except as otherwise provided in the classification, all inter-



state rates in effect on June 2, 1915, would continue in force, disregarding provisions in tariffs, classifications, and exception sheets which limit the liability of carriers, and to continue a provision that property carried not subject to the terms and conditions of the carriers' bill of lading would be at carriers' liability, limited only by the common law and the laws of the United States and of the several states in so far as they might apply, and property so carried would be subject to rates 10 per cent higher than those shown in the tariffs. The western classification roads, in the main, took a position substantially like that taken by the official classification roads. Their representatives expressed to the committees of Congress the view that the enactment of the amendment in question would by striking from the uniform bill of lading vital provisions, automatically throw the roads back upon their common-law liability and the increased rates. They admitted that a 10 per cent increased liability would justify some increase in rates, but emphatically disclaimed any disposition to take advantage of a technical opportunity to mulct the shipping public. They were of opinion that they still had the right to provide rates upon live stock dependent upon the declared value of the stock, and that a shipper who misstates the true value of his statement is guilty of violation of section 10 of the Act, just as he would be if he misstated the commodity shipped. They suggested that their existing rule, which provided in general for an increase of 10 per cent in the rate for each 100 per cent of increase in the declared valuation was probably too high; that an increase of 5 per cent in the rate for each 100 per cent increase in the value, or of 3 per cent in the rate for each increase of 50 per cent in the value, would be a more equitable rule. They, like the eastern roads, had numerous commodity rates based upon valuation, and thought they might lawfully continue that practice. They had not had, however, opportunity since this bill was enacted to formulate in detail the changes which they thought necessary and proper. From the best information that could be gathered from testimony that had been submitted in various cases, it appeared that prior to 1913 the limited liability provisions contained in the shipping

contracts, classifications, and rate schedules were very generally disregarded in the settlement of loss and damage claims, especially in the western classification territory. It seemed therefore, that to a very large extent at least, despite the limitations of liability stated in the contracts and schedules, full value was quite generally recognized in the settlement of claims. After the Supreme Court decided the Croninger case, *supra*, in 1913, the provisions of the contracts and rate schedules in this and other particulars were recognized as lawfully binding upon carriers and shippers alike, and the policy followed was correspondingly changed. It was pointed out that prior to 1906 many of these limitations of liability were not contained in the shipping contracts and rate schedules; that in 1906 they were incorporated therein, but were largely ignored until 1913; that in 1913 the policy was generally adopted of endeavoring to enforce the limited liability provisions, and that neither in 1906 nor in 1913 was any change in the rates undertaken because of the limited liability. It was argued that inasmuch as no reduction in rates was made when the limited liability provisions were established, or when they were sustained as lawful by the Supreme Court of the United States, there was no justification for an increase in rates when the liability conditions were restored to substantially what they were prior to 1906. Limitations of liability had been incorporated in live-stock shipment contracts for many years, but, it appeared that at least in the territory where there was the greatest movement of live stock those limitations were generally disregarded in settlement of claims. The so-called uniform bill of lading, which had been in use in official and western classification territories, contained a provision that claims for loss or damage must be presented to the carrier within four months, but until the Croninger case, *supra*, was decided by the Supreme Court no effort was made by the carriers generally to enforce or to observe that provision. After the Croninger case was decided the carriers adopted an entirely different course and took the position that this provision being in the bill of lading, and the terms of the bill of lading in the rate schedules, therefore it was unlawful to depart from that requirement. This created a general controversy, and the sudden change from ignoring a rule to literally

enforcing it necessarily created multitudes of unjust discriminations. The question was presented to and considered by the Commission, and as the fair and only means of composing the situation and avoiding endless controversy and litigation, the Commission issued its report, *In the Matter of Bills of Lading*, 29 I. C. C., 417. The Cummins amendment makes it unlawful for the carrier to fix a period for giving notice of claims shorter than 90 days, for filing of claims shorter than four months, and for the institution of suits shorter than two years. The law does not indicate the time or date from which these several periods of time shall be computed; that is, whether from the date of delivery by the carrier of the damaged property, or in case of loss, after a reasonable time for delivery has elapsed, from the date shown on the bill of lading, or from the occurrence of the loss or of the damage. The Commission came to the conclusion that these provisions evidently were, in common with the other matters governed by the amendment, confined to instances of loss, damage, or injury caused by the carriers, and that it would be necessary for the carriers to determine what periods of time they would fix for the giving notice of claims, the filing of claims, and the institution of suits. The dates or times from which such periods shall run should also be fixed in the rules. In the interest of thorough understandings and to avoid controversies it is very desirable that these rules be uniform for all the carriers of the country. It is to be remembered that the Cummins amendment is not a separate statute, but is an amendment to the act. It must, therefore, be construed as a part of, and in connection with other portions of, the Act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the act other than that part known as the Carmack amendment. The new amendment should, if possible, be so construed as to give full force to its clear purpose, without impairing the effect of any other provision of the Act. The more important points which seem to be surrounded with the most doubt and upon which opinions so far expressed most sharply conflict are:

1. If no changes are made in the existing shipping contracts and rate schedules, will the higher rates provided therein auto-

matically become lawfully applicable upon the date upon which the amendment takes effect?

The Carmack amendment, adopted in 1906, provided that no contract, receipt, rule, or regulation should exempt the carrier from the liability thereby imposed. As has been said, no effort was made to change rates because of that amendment to the act. The classifications or rate schedules provide that unless the terms of certain bills of lading are accepted higher rates will apply. The terms of the bill of lading could be modified or changed to any extent without automatically changing any rate. Prior to 1913 many of the limitations contained in bills of lading or other shipping contracts were treated as if they did not exist, and it was never suggested that the validity or invalidity of any such provision affected the rate. It is contrary to all canons of construction to hold that an act of Congress produces a result not intended by Congress unless the express language of the act compels such a construction. There is nothing in the expressed terms of this act or in the history of this legislation that shows any intent or purpose on the part of Congress to affect in any degree the existing rates charged by carriers for transporting property. The legislation is aimed at specified contracts and declares them to be unlawful. The lawful rates on file at this time, therefore, are the rates providing for the limited liability. The Cummins amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10 per cent increased rates are merely additional and can not stand in and of themselves. Applying correct rules of interpretation, the Cummins amendment does not automatically bring into effect the increased rates named in the classifications and tariff publications as applicable to shipments which are not made subject to the terms of the uniform or carrier's bill of lading.<sup>36</sup> The general rule (which as has appeared, has not been abrogated by the Cummins Amendment) is that while a common carrier cannot exempt itself from negligence, it may, by fair and reasonable exemptions, limit the amount recoverable by a shipper to an agreed value made for the purpose of obtaining a lower rate of

36. In re the Cummins Amendment, 33 I. C. C., 682.

two or more rates, proportionate to the amount of the risk.<sup>37</sup> A contract limiting or restricting the common-law rule as to the liability of a carrier for negligence in the shipment of goods is valid only when based on a consideration, usually a reduction in the rate of the freight charged.<sup>38</sup> It may be stated no principle of law is now more firmly established than that a common carrier, in the absence of any statute to the contrary, may by special contract limit its liability, at least against all risks but its own negligence or misconduct.<sup>39</sup> But a qualification of the carrier's right to restrict his common law responsibility, almost as generally recognized as the right itself, and supported by innumerable authorities, is that a carrier cannot by special and express contract exempt himself from liability for any negligence or misconduct of himself or his agents.<sup>40</sup> A live stock contract limiting liability with the usual provisions concerning notice of loss and claim for damages is not *prima facie* invalid under the Carmack Amendment, but competent testimony must be introduced concerning its making in order to sustain a claim for its invalidity.<sup>41</sup> There is a sound public policy in preventing a common carrier from maintaining a defense of a lesser agreed value for goods, and in allowing the shipper to recover a greater market value, after the carrier has been guilty of converting the goods. It has been said that though the contract with the agreed valuation calls for an interstate shipment, the United States Supreme Court has not held, nor

37. *K. C. & M. Ry. Co., (Ark.)*, 170 S. W. 565, 566; *Southern Nursery Co. v. Winfield Nursery Co.*, (Kan. 1913), 132 Pac. 149.

And a carrier was not bound by any private instructions given by a shipper to his agent who delivered the property to the carrier for shipment limiting the agent's authority to bind the shipper. *Donovan v. Wells Fargo & Co.* (Mo. 1915) 177 S. W. 839.

38. *K. C. & M. Ry. Co., (Ark.)*, 170 S. W. 565, 566.

39. *Hix v. Eastern Steamship Company*, 107 Me., 357; 78 Atl. 379. *Wabash R. R. Co. v. Pridley*, (Ind. 1913), 101 N. E. 724, 728.

40. 4 *Ruling Case Law*, 232, and cases there cited; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Wills v. Grand Trunk Ry. Co.*, 62 Me. 488; *Little v. Boston & Maine R. R.*, 66 Me. 239; *Young v. Maine Cent. R. Co.*, (Me. 1915), 93 Atl. 48, 49.

41. *Thomas Bros. v. St. L. & S. F. R. Co.*, (Mo. 1915), 173 S. W. 96, 99.

tended to hold, such a contract applied to conversion.<sup>42</sup> So where a carrier transported freight to a wrong place, and there sold it as unclaimed freight, it converted it and was liable for its full value, though the contract of shipment fixed a less sum as value, and though a carrier merely losing freight may rely on the limited liability.<sup>43</sup> A section in the bill of lading which provides as follows, "The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided. No carrier or party in possession of any property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or differences in the weight of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights," is void under the Carmack Amendment.<sup>44</sup> The Cummins Amendment, has in effect abolished in interstate commerce the whole system of released rates based on agreed valuations as distinguished from actual value.<sup>45</sup> Provisions in a bill of lading limiting liability under released rates will not hereafter be of interest, because the Cummins Act of March 4, 1915 (38 Stat. 1196, c. 176), amending the federal Interstate Commerce Act, invalidates all attempted agreements of this character between the shippers and the carriers.<sup>46</sup> In cases of foreign shipments the carrier has the unrestricted right to limit its liability, and when the shipper delivers his freight for foreign transportation under a bill of lading limiting the carrier's liability the limitations are enforceable. Such rule, is, however, subject to the limitation arising as matter of law that the carrier will be liable for the loss occurring through the excepted cause if the negligence of itself or its servants contributed thereto.<sup>47</sup> A con-

42. *St. L. I. M. & S. Ry. v. Wallace*, (Tex. 1915), 176 S. W. 764, 766.

43. *St. Louis, I. M. & S. Ry. Co. v. Wallace*, (Tex. 1915), 176 S. W. 764.

44. *Barnett v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 374, 377.

45. *Iowa Railroad Com'rs. v. A.*

*T. & S. F. Ry.*, 36 I. C. C. 79, 81.

46. *Norfolk & W. Ry. Co. v. A. J. Steele & Son* (Virginia 1915), 86 S. E. 124, 127.

47. *Texarkana & Ft. S. Ry. Co. v. Brass*, (Tex. 1915), 175 S. W. 778, 780; *K. C. S. Ry. v. Carl*, 33 Sup. Ct., 391, 394, 227 U. S. 639; 57 L. Ed. 683.

tract of shipment limiting the liability for loss and injury to an interstate shipment of cattle is valid.<sup>48</sup>

A carrier, under the Cummins Amendment may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the Act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause. It follows further that the rates provided by such tariff may be proportionate to the risk assumed.<sup>49</sup> In those instances in which the carrier desires to limit its liability to the value of the property as specifically stated in writing by the shipper, the rate must be based upon the declared value and be so published;<sup>49½</sup> but the Commission apparently must determine in advance of such publication that the commodity is one the value of which cannot be known to the carrier from ordinary sources or reasonable inspection, and to which rates based on declared value may be applied in connection with which the carrier's liability is limited to the value so declared. In determining that question the inquiry is whether or not the commodity is one the value of which is peculiarly within the knowledge of the shipper. If it has a definite market value or its value depends upon facts of which the carrier has equal knowledge

48. *Ball v. Lusk*, (Mo. 1915), 33 Sup. Ct., 155, 226 U. S. 519; M. 175 S. W. 238, 239.

49. The Cummins Amendment, 671, 676; *Harrison Granite Co. v. G. T. Ry. System*, (Mich. 1913), 23 I. C. C. 682, 695.

49½. *C. B. & Q. Ry. v. Latta*, 141 N. W. 642, 645.

with the shipper, the "character" of the shipment is known to the carrier, and the proviso does not apply. Congress did not affirmatively recognize any rates based upon declared value other than those authorized by this proviso. This, of course, does not mean that commodities may not be reasonably classified according to value and be subject to different rates applicable to different grades of the same commodity, which is a different matter from limiting the liability to the declared value.<sup>50</sup> The Cummins Amendment clearly places upon the carriers, liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with the Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.<sup>51</sup> The purpose of the Cummins Amendment is, except as otherwise provided therein, to invalidate all limitations of carrier's liability for loss, damage, or injury to property caused by the initial carrier or by another carrier to which it may be delivered or which may participate in transporting it. The law does not specifically say that attempts so to limit the carrier's liability shall not be resorted to, but it declares them to be invalid and unlawful wherever found and in whatever guise they may appear. Neither bills of lading or other contracts of carriage, or classifications or rate schedules should contain any provision so declared unlawful.<sup>52</sup>

50. The Cummins Amendment, 33 I. C. C. 682, 693.  
33 I. C. C. 682, 695.

52. The Cummins Amendment,

51. The Cummins Amendment, 33 I. C. C. 682, 687.



One who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment from an express company, limiting the amount of recovery to \$50.00, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and imposing liability for the full value of the goods, is not entitled in case of loss to recover the full value of the property, altho the same may have been \$20,000.00.<sup>53</sup> Contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence.<sup>54</sup> The contract embodied in the receipt in the express company cases, was sustained because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. In each of those cases the filed tariff showed an opportunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate, and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. So long as the tariff rate re-

53. *Pierce Co. v. Wells, Fargo & Co.*, 35 Sup. Ct. Rep., 351, 353, 236 U. S. 278, 59 L. Ed. 576.

Where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability and in "a fair, just and reasonable agreement" declares or agrees the value of his shipment is a certain sum and thereby secures a reduced transportation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss of or damage to the property, and conclusively presumed to have known the governing tariff.

*The Cummins Amendment*, 33 I. C. U., 682, 683.

Under a bill of lading providing that every service to be performed thereunder is subject to conditions contained in it, a shipper is bound by a limited liability condition on a reduced rate applicable to the transportation for a loss which occurs while in a warehouse at destination and cannot recover more than such limited liability. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed.--36 Sup. Ct. 177, 180.

54. *George N. Pierce v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. Rep. 351, 353

mains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties.<sup>55</sup> Shippers do not have to declare the real worth of their goods if they wish to ship at limited liability and take the risk of a recovery for very much less than the value.<sup>56</sup>

The interstate shipper of a hog by express is bound by a valuation stated in the shipping receipt, upon which the rate is based, where he had an opportunity to place such a valuation on the hog as he desired and pay a rate for carriage in proportion to the value declared, although the express agent did not have power to accept property for shipment at unlimited liability.<sup>57</sup> A common carrier may limit its common-law liability by a stipulation in the contract of carriage, assented to by the shipper, which discloses a purpose to secure a just and reasonable proportion between the amount charged for the carriage and the amount for which the carrier is to be liable in the event of loss or injury. But, in the absence of a statute governing the matter, it is an established rule applicable to such contracts for the carriage of property that the carrier cannot limit its liability for the negligent loss or destruction of the thing carried to a valuation of it agreed upon in consideration of a reduced charge for its carriage when such valuation is greatly below the real worth of the property; such a stipulation as to value being regarded as unreasonable and the enforcement of it against public policy, where the reduction in the freight charge from that which would have been made in the absence of such agreement is greatly less in proportion than the unreasonable depreciation of the real value of the thing carried which is shown by the stipulated valuation of it.<sup>58</sup> Provisions in a bill of lading that the amount for which the carrier should be liable on a shipment of live stock is \$50.00 for each bull or ox, \$30.00 for each cow and \$10.00 for each calf, are valid.<sup>59</sup> The owner of damaged live

55. *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. Rep. 351, 354.

56. *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. Rep. 351, 354.

57. *Adams Express Co. v. Welborn*, (Ind. 1915), 108 N. E. 163, 164.

58. *Louisville & N. R. Co. v. Jones*, (Ala. 1915), 67 So. 621, 622.

59. *Illinois Central R. Co. v. J.*

stock shipped under a released valuation of \$100 per head which has been salvaged by the carrier, is entitled to recover the amount realized by the carrier on the sale of such stock and in addition the difference between the market value of the injured stock at destination if they had arrived there in ordinary condition, considering the distance of transportation, and their market value in the condition in which they did arrive; the damage in no event to exceed \$100 a head.<sup>60</sup> But where the shipper and carrier through mistake signed an old form of shipping contract under which the released valuation of live stock is \$75.00 a head, such a contract is not binding, but the published maximum valuation must control.<sup>61</sup> Where the shipper signs a contract limiting the carrier's liability to an agreed valuation based on the published rate, he will be conclusively presumed to have agreed to the maximum valuation,<sup>61½</sup> yet the mere fact that the shipper signed a bill of lading containing a maximum valuation not based on the published rate, but on an old rate no longer in force, and to which his attention was never called, and which he had the right to believe was the correct maximum valuation, cannot be regarded as conclusive of his rights.<sup>62</sup> A shipper of live stock and a carrier are not required to agree on the maximum valuation to which a released rate is applicable but may agree on a valuation less than the maximum.<sup>63</sup> In the state of Texas, on intrastate shipments, the initial carrier may limit liability to its own line. The soundness of this decision however may well be questioned in view of the Carmack Amendment because the federal law supersedes all state decisions.<sup>64</sup> Under a contract providing for limited liability,

R. Kilgore & Son, (Ala. 1914), 67 So., 707, 708.

60. Rankin v. C. N. O. & T. P. Ry. Co., (Ky. 1915), 173 S. W. 377, 379.

61. Rankin v. C. N. O. & T. P. Ry. Co., (Ky. 1915), 173 S. W. 377, 379.

61½. K. C. S. Ry. Co. v. Carl, 33 Sup. Ct. 391, 395, 227 U. S. 639; H. K. & T. R. R. v. Harriman Bros.,

33 Sup. Ct. 397, 401, 227 U. S. 657.

62. Rankin v. C. N. O. & T. P. Ry. Co., (Ky. 1915), 173 S. W. 377, 379.

63. Rankin v. C. N. O. & T. P. Ry. Co., (Ky. 1915), 173 S. W. 377, 379. See C. N. O. & P. Ry. Co. v. Rankin, 36 Sup. Ct. 555, 241 U. S. 319.

64. G. H. & S. A. Ry. Co. v. Pat-

where part of the shipment is damaged, the carrier is liable for the entire amount of the damage up to the limited amount and not merely for such proportion as the part damaged bears to the entire value of the shipment.<sup>65</sup> Until a carrier establishes the filing of released rates as provided in the Interstate Commerce Act the burden is on it to show the fairness and reasonableness of the contract for interstate shipment, if it attempts to limit liability on graduated rates. When the fact of filing is established, the shipper is compelled to take notice of the rates contained in the tariff schedule, "not only because referred to in the contract signed by him, but because they had been lawfully filed and published."<sup>66</sup> When the carrier graduates its rates by value, and has filed its tariffs showing the rates applicable to a particular commodity or article of commerce, based upon a difference in valuation, the shipper must take notice, for the valuation, as said in the Harriman case, "automatically determines which of the rates is the lawful rate."<sup>67</sup> If a schedule of rates on an interstate shipment has not been filed and published as required by the Interstate Commerce Act, then the reasonableness of the contract becomes a question of fact, and depends upon whether the value was declared for the purpose of obtaining a lower of two or more rates proportioned to the amount of risk.<sup>68</sup> Where household goods are shipped under a bill of lading and a contract for a reduced rate under which loss is released to \$10.00 per 100 pounds an instruction that the railroad is not liable for chafing, marking, scratching, coming apart, or other damage to the furniture caused by ordinary jerks and jars of train movements or in stopping or starting of trains is proper.<sup>69</sup> Where a shipper of live stock made an oral contract for the transportation of the same and just as the livestock train was starting was induced by the conductor to sign a written contract

terson, (Tex. 1915), 173 S. W. 273, 274. L. Ed. 690.

65. Central of Ga. Ry. Co. v. Broada, (Ala. 1914), 67 So. 437; also see 3, *supra*, p. 190.

66. M. K. & T. Ry. v. Harriman, 227 U. S. 669, 33 Sup. Ct. 397, 57

67. Adams Express Co. v. Cook, (Ky. 1915), 172 S. W. 1096, 1098.

68. Adams Express Co. v. Cook, (Ky. 1915), 172 S. W. 1096, 1098.

69. Best v. G. N. Ry., (Wis. 1915), 150 N. W. 484, 486.

which he had no chance to examine, his signature to the same is void and the contract is invalid.<sup>70</sup>

Where there has been an unlawful declared or agreed undervaluation of property in fixing tariff rates in interstate shipments without the actual knowledge thereof on the part of the carrier, the shipper is estopped to recover more than such declared or agreed value.<sup>71</sup> An undervaluation of property in fixing interstate freight rates based upon value, whereby the shipper obtains a lower tariff rate than the actual value of the property requires, is prohibited by law; and a stipulation in a shipper's contract for the release of a carrier from liability for loss of the property in excess of the amount at which such property is so undervalued, if the carrier has actual knowledge of such undervaluation, is void, and can neither be made the basis of an action nor of a defense.<sup>72</sup> In an interstate shipment of property, a stipulation limiting the carrier's liability to the agreed value of the property is valid, even when loss is due to the carrier's negligence, if the shipper himself has declared the value expressly or by implication, the carrier accepting the same in good faith as the real value, and the rate of freight being fixed in accordance therewith.<sup>73</sup> In a typical case the action involved the liability of the railway company under a contract for an interstate shipment of hogs. Plaintiff shipped from Murfreesboro, Tenn., to Louisville, Ky., two car loads of hogs. In the contract of shipment was a provision limiting the liability of the railway company in case of loss to \$5 per head. There was on file with the Interstate Commerce Commission, and posted at the stations of the railway company, as required by law, the rates for interstate shipments, which included the rates from Murfreesboro to Louisville on the transportation of live stock.

70. *Gulf C. & S. F. Ry. Co. v. Vasbinder*, (Tex. 1915), 172 S. W. 763, 764.

71. *St. L. & S. F. R. Co.*, (Okla.) 144 Pac. 1036, 1037. But see *Visnake v. Southern Exp. Co.*, (S. C. 1912), 75 S. E. 962, 963.

72. *St. L. & S. F. R. Co.*, (Okla.) 144 Pac. 1036, 1037; *Wells-Fargo & Co. v. Neiman-Marcut Co.*, 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct., 267.

73. *St. L. & S. F. R. Co. v. Mounts*, (Okla.), 144 Pac. 1036, 1037.

One form of these contracts on file was optional with the plaintiff, by which he could have contracted so that the railway company would assume the full common-law liability in case of loss. There were 51 hogs lost in the shipment, and the actual value of the hogs exceeded largely the \$5 per head of contractual liability. Held that although all the proof went to show that this rate was unreasonably out of proportion to the rate charged limiting the liability and that was so high that no shipments are made under it, still the federal authorities were controlling upon this subject, and it was the duty of the state courts to follow the rulings of federal courts. The cases in the federal courts give conclusive authority to uphold the contract here in question.<sup>74</sup> It was held that it is an established rule of the common law as declared by the Supreme Court of the United States in many cases, that a carrier may, by fair, open, just, and reasonable agreement, limit the amount recoverable by a shipper, in case of loss or damage, to an agreed value made for the purpose of obtaining the lower of two or more rates or charges proportioned to the amount,<sup>74½</sup> and the court reached the conclusion that the provision of the act of Congress in question, forbidding exemption from liability imposed by the act, was not violated by a contract limiting liability when freely and fairly entered into.<sup>75</sup> The federal authorities permit one inquiry, viz.: Was the contract fairly entered into between the parties? The rate cannot be questioned except before the Commission; and, when fairly entered into, the amount of the agreed valuation cannot be afterward disputed. In the case of *Pierce Co. v. Wells Fargo Co.*, the actual value of the automobiles was \$15,000, while the agreed valuation was only \$50, but the contract was upheld notwithstanding this disparity. The agreement that \$15,000 worth of automobiles are only worth \$50 may seem absurd, but if the representation was made by the shipper in order to get the lower of two rates open to him, it is held that he is bound by the

74. *J. T. Rather & Co. v. Nashville, C. & St. L. Ry. Co.*, (Tenn. 1915), 174 S. W. 1113, 1114, 1115. (Ind. 1913), 101 N. E. 724, 728.

74½. *Wabash R. R. v. Priddy.*

75. *J. T. Rather & Co. v. Nashville, C. & St. L. Ry. Co.*, (Tenn. 1915), 174 S. W. 1113, 1115.

agreement.<sup>76</sup> The only thing left open is as to whether the contract (however hard it may seem) was freely and fairly entered into.<sup>77</sup> In the O'Connor Case, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703, and the Robinson Case, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901, it was said that the conclusiveness of the filed rates has no application to attempted fraudulent acts or false billing. But there is no hint at fraud or false billing in the present case. The rates were open to inspection at the station of the carrier at Murfreesboro, and if the terms of the contract were not known, they were at least available to plaintiff. He must take notice of the rates applicable when they are filed with the Interstate Commerce Commission, as required by law, and actual want of knowledge is no excuse. The shipper's knowledge of the lawful rate is conclusively presumed. The rate when made out and filed is notice, and its effect is not lost, although it is not actually posted at the station.<sup>78</sup> The fact that the agreed value was not the result of special negotiation between the parties, but was a fixed and arbitrary value put into the contract by the carrier, and appearing in a list applying to any and all animals of a class, regardless of actual value, does not seem to render it any the less the contract of the parties, according to the federal cases.<sup>79</sup>

When a shipment is tendered to a common carrier in good order for shipment, it is the duty of the common carrier to receive and ship it, and the common carrier is required to do so and receive for its services the usual freight charges. The shipper has the right to ship the articles unreleased, and recover full damages for any loss or damages that occurs, and the full freight charges must be paid. However, the parties have the right, in

76. *Pierce Co. v. Wells, Fargo Co.*, 35 Sup. Ct. 351, 236 U. S. 278, 59 L. Ed. 576; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868; *Kansas Sou. Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

77. *J. T. Rather & Co. v. Nash-*

*ville, C. & St. L. Ry. Co.*, (Tenn. 1915), 174 S. W. 1113, 1115.

78. *Kansas City Sou. Ry. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; *J. T. Rather & Co. v. Nashville, C. & St. L. Ry. Co.*, (Tenn. 1915), 174 S. W. 1113, 1115, 1116.

79. *J. T. Rather & Co. v. Nashville, C. & St. L. Ry. Co.*, (Tenn. 1915), 174 S. W. 1113, 1116.

consideration of reduced rates, to release the property shipped and limit the liability; but a contract must be made to this effect, or the shipper's attention must be called to what has been done, or intended to be done, and he must assent thereto. A common carrier has no right to limit its liability to the shipper to property shipped without the consent or assent of the shipper. When property is tendered for shipment, it is presumed that the shipper desires to ship it unreleased, pay full freight charges, and collect for loss or damage full value. It is for the shipper to determine whether he will release his shipment, pay a less freight charge, and collect a limited value in case of loss or damage. He can contract to do this, or if his attention is called to the fact that it is being done, and he consents or assents to it, he will be bound. A railroad will not be allowed to make a one-sided contract to limit its liability to a shipper without the shipper's consent.<sup>79½</sup> It is for the shipper to direct whether his shipment is to be shipped "unreleased" or "released." To hold otherwise would be unreasonable and farcical, and open the door to injustice and fraud.<sup>80</sup> In a typical case a shipper brought suit for the recovery of damage to a shipment of household furniture released to a valuation of \$10 per cwt. which released rate had been filed with the Interstate Commerce Commission. The shipper had given his goods to a transfer company without any instructions whatever with regard to shipping it, and this transfer company shipped the goods on its own initiative. The plaintiff contended he was not bound by the action of the transfer company. It was held that, as a matter of law it could not be said that the power of the transfer company as defined was extensive enough to sanction the stipulation about the value of goods or the agreement to the various conditions and provisos that are usually found on the back of documents like the bill of lading, unless something more was shown in the way of customary dealings between the parties, or some general usage of which all concerned were deemed to have taken notice as a binding rule of business. Since it was not pretended that the plaintiff himself executed or specially authorized the transfer company to execute for him the bill of

<sup>79½</sup>. *C. C. C. & St. L. Ry. v. Hayes*, (Ind. 1913), 102 N. E. 34, 41. <sup>80</sup>. *Wise v. Atlantic Coast Line R. Co.*, (S. C. 1915), 86 S. E. 22, 23.



lading, and there being nothing to show he elected to ship under the uniform bill of lading, he was entitled to recover the full amount of his claim.<sup>81</sup>

Where a shipper tenders to a carrier live stock for transportation, and voluntarily enters into a written contract with the carrier that in consideration of the reduced rate of freight he assents to certain stipulations therein contained, and where it is not

81. *Grice v. Oregon-Washington R. & Navigation Co.*, (Oregon 1915), 150 Pac. 862, 865; see p. 221.

Section one of the Uniform Bill of Lading provides, inter alia:

"When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

Reasonable limitations of liability, whereby in consideration of the reduced rate the shipper and carrier agree upon a valuation for goods which may be less than the real value, are reasonable. However, there is a distinction between rates based on value and limitations of liability. The law sustains the former and in many cases condemns the latter. It is well settled, however, that the law requires the carrier to afford all shippers, rates that are reasonable and unconditional as to the carrier's liability

in case of loss or damage.

*Norcross Bros. Co. v. L. & N. R. Co.*, 29 I. C. C., 109, 112.

*C. C. C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34, 41.

*In re Released Rates*, 13 I. C. C. 550.

In the case in *re Released Rates*, 13 I. C. C. 550, the Commission held unlawful a stipulation in the bill of lading that the carrier would not be liable for loss, "from any cause on property carried on open cars." Section 1 also provides that the burden is on the carrier to prove freedom from negligence. In *Lyon v. A. C. L. R. Co.*, 81 S. E. 1, it was held that in case of limited liability, proof of shipment and loss or injury make a prima facie case for the shipper, and the burden is then on the carrier to show loss with the excepted causes, and further that the loss or injury was not due to its own negligence. It is the duty of the carrier to furnish cars suitable for the transportation of such commodities as it holds itself out as transporting. It, therefore, has no right to limit its liability in transporting commodities on open cars because of "general custom" or "the nature of the property."

contended that any fraud was perpetrated by the carrier's agent in procuring the contract, it is not error to repel testimony by the shipper that at the time of the shipment nothing was said about rates.<sup>82</sup> A provision in the bill of lading limiting the amount recoverable, in the case of loss, to \$5 per hundred pounds in consideration of the payment by the shipper of a lower lawful tariff rate, does not constitute an exemption from liability such as is forbidden by the Carmack Amendment.<sup>83</sup> In interstate shipments, irrespective of the bill of lading and whether the carrier has by proper bill of lading or lawful contract limited its liability to the shipper in case of loss, the published freight rate or tariff, when based on a valuation of the goods carried, binds the carrier, and the valuation placed on the goods by the shipper for the purpose

If such cars are not proper, it should not furnish them either because of general custom or for any other reason. Where, however, the shipper requests "open cars", and the commodity is such as should not be transported in them, the carrier may lawfully limit its liability in the manner prescribed. To this extent this provision is valid. However, the carrier has no right to compel the shipper to use open cars under the limitation specified without also permitting transportation at unlimited liability.

The tariff or the bill of lading should certainly provide for this. It is unlawful to compel a shipper to use a restricted rate without also granting an opportunity to ship at unlimited liability.

In *C. C. C. & St. L. Ry. Co. v. Blind*, (Ind. 1914) 105 N. E. 483, the court said p. 486.

"...It is well settled that a common carrier may enter into a contract with the shipper by

which its liability is limited in consideration of a reduced rate of transportation, provided the shipper is given a full, fair, and bona fide opportunity to ship under a higher rate, and with unlimited liability on the part of the carrier; but it is not necessary that the shipper should have actually been offered the opportunity of shipping at the higher rate, and under the carrier's common-law liability. If he had demanded it, that is sufficient."

*Cleveland etc., Co. v. Hollowell*, 172 Ind. 466, 470, 88 N. E. 680; *Kansas City etc., Co. v. Albers Commission Co.* (1912) 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556; *Deming v. Merchants' etc., Co.*, 90 Tenn. 327, 17 S. W. 93, 13 L. R. A. 518; *Hutchinson on Carriers*, (3rd ed) sec. 404.

<sup>82</sup> *Kent v. C. of Ga. Ry. Co.*, (Ga. 1915), 85 S. E. 1017.

<sup>83</sup> *Michelson v. Judson Freight Forwarding Co.*, (Ill. 1915), 109 N. E. 281, 285.

of obtaining the rate published limits a recovery to such valuation in case of loss.<sup>84</sup> The owner of property, who delivers household goods of great value to a forwarding company to ship for him, without any specific directions as to the manner and rate under which the shipment is to be made, is bound by the action of the forwarding company in shipping such goods, released to a rate of \$5 per 100 lbs. and cannot recover greater than that value from the railroad in case of loss.<sup>85</sup> The carrier may limit the value of the goods and the recoverable damages in case of loss or destruction under the contract of shipment by a reasonable limitation.<sup>86</sup> In an interstate shipment, where the liability of the carrier is proportioned and limited under a just and reasonable agreement that in case of loss or injury the shipper shall recover no more than a certain valuation of the property transported, which is fixed by an agreement made in consideration that the shipper shall have the lower of two rates, the limitation enters into and becomes a part of the rate, and the parties cannot, by any compromise or agreement after a loss has occurred change the limitation and arrange for the payment of a greater amount than the value as fixed in the shipping contract, and which became a factor of the rate charged.<sup>87</sup>

In an investigation by the Interstate Commerce Commission complainants attacked as unreasonable and unlawful the carriers' rules and regulations governing the shipment of live stock under shipping contracts restricting their liability for loss or damage to certain specified amounts, and their rates for valuations in excess of the amounts so specified. The territory served by the carriers in which these rules, regulations, and rates were in force in general was that portion of the United States west of Chicago, Ill. The tariffs, bills of lading, and shipping

84. *Michelson v. Judson Freight Forwarding Co.*, (Ill. 1915), 109 N. E. 281, 286.

85. *Michelson v. Judson Freight Forwarding Co.*, (Ill. 1915), 109 N. E. 281, 286; see p. 219.

86. *Louisville & N. R. Co. v. Jones*, (Ala. 1915), 68 So. 871; *Am-*

*erican Silver Mfg. Co. v. Wabash R. R.*, (Mo. 1913), 156 S. W. 830, 833; *C. N. O. & T. P. Ry. v. Dodd*, (Ky. 1913), 156 S. W. 894.

87. *Donohoo Horse & Mule Co. v. Missouri K. & T. Ry. Co.*, (Kan. 1915), 149 Pac. 436.

contracts provided two sets of rates for the shipment of live stock in carloads, viz: (1) Rates subject to the condition that in case of loss or injury in transit the carrier should not be liable in excess of the valuations there scheduled for the several kinds of animals; (2) higher rates, free from such condition, when higher values were declared by the shipper. The main questions presented for determination were: Whether or not the provisions for released rates were unjust, unreasonable, and unlawful in that the valuations scheduled were unreasonably low, not representative of the fair actual values, and mere arbitrary limitations of the amount of recovery; and whether or not the rates for live-stock shipments of excess value were unjust, unreasonable, and unlawful. Since that record was made up, the Cummins Amendment to the Interstate Commerce Act, to which reference is later made, has in effect abolished in interstate commerce the whole system of released rates based on agreed valuations as distinguished from actual value, thus removing from consideration the first of these two main questions except in so far as it involved determination of the reasonableness of the scheduled valuations as representing actual values and thus as a basis for rates in the future.

The scheduled valuations shown by the record were as follows:

Each horse or pony (gelding, mare, or stallion), mule, jack, or jenny .....	\$100
Each colt under 1 year .....	50
Each ox, bull or steer .....	50
Each cow .....	30
Each calf .....	10
Each hog .....	10
Each sheep or goat .....	3

Presumably in view of the Cummins Amendment, supplement No. 5 to western classification No. 53, I. C. C. No. 11, stated that, effective June 4, 1915, "minimum ratings given below are based upon values declared by shippers, not exceeding the following under contract." The values specified were, for the respective animals, the same as those given in the foregoing table. Of the total live-stock tonnage handled in the territory concerned, 99

per cent consisted of the ordinary run of animals. It was admitted that in making rates a distinction might properly be made between such animals and "blooded stock" of the same species. Rates or regulations affecting the transportation of the former were alone involved. The tariff provisions as to valuation and the values above set forth were made a part of the shipping contracts in use by the carriers. They had been a part of the rate structure for many years. The record did not show when they were adopted, as the witnesses, some of them men well along in years and of lifelong experience in stock raising and shipping, could not recall the time when they were not in effect. Such contracts have been made upon the basis of these valuations for 30 years and more. Nor did the record show why the values were originally fixed at these figures. The carriers introduced no evidence, but said in their brief that such value "was intended to be the maximum value upon which the minimum rate was fixed." Many witnesses for complainants testified that the values, up to perhaps 15 years ago, represented the fair average value of the different animals. Prior to the early part of 1913 the carriers throughout the livestock producing territory involved were accustomed to disregard these limited valuations in the settlement of claims made for the loss of, or injury to, animals in transit. Those states in which the live-stock business was important had quite generally held the carriers to full liability for the actual loss or injury in transportation. And where any limitation of value had been permitted, the rule had been that the contract valuation must be fairly related to the actual value and not arbitrary. But with few exceptions the courts in those states held that the contract of limitation of liability was void and that the measure of the carrier's liability was the actual loss sustained. This was so both before and after the Carmack Amendment of 1906 to the Act to regulate commerce. On January 6, 1913, the Supreme Court of the United States, in the case of *Croninger v. Adams Express Co.*, 226 U. S., 491, construed the Carmack Amendment and held that under contracts for transportation which limit liability, as did those here in question, the shipper could not recover in excess of the valuation specified in the contract. This doctrine was followed in *C. B. & Q. Ry. Co. v. Miller*, 226 U. S.,

513; *C. St. P. M. & O. Ry. Co. v. Latta*, 226 U. S., 519, *M. K. & T. Ry. Co. v. Harriman*, 227 U. S., 657; and *C. R. I. & P. Ry. Co. v. Cramer*, 232 U. S., 490, these cases involving, respectively, attempts on the part of shippers to recover the full value (1) of a stallion, (2) of 2 horses, (3) of 4 bulls and 13 cows, and (4) of 60 hogs shipped in interstate commerce at the lower of alternative rates based on agreed valuations, and lost or injured through the negligence of the carriers. Since these decisions the carriers involved in settling such claims had complied with the Interstate Commerce Act, refusing to pay more than the contract limit. Under the rule in the *Croninger* case, *supra*, the amounts paid in settlement of claims for loss of live stock were frequently much less than actual value. In such cases the shipper lost the difference. Where the actual value was less than the contract limit the shipper was protected, but the carrier had never been liable for more than the actual value. During the last 30 years the average value of live stock had greatly increased. The increase in some grades reached 100 per cent. A large part of the live-stock shipments now made greatly exceeds in average value the contract limit of valuation. But there was a substantial movement of live stock which averaged in value less than the contract limit. The Commission had frequently been called upon to prescribe reasonable rates on live stock. In such cases the element of loss and damage had been urged by the carriers and considered by it. The record was clear that the average values of these different kinds of live stock at the present time are greatly in excess of the valuations named in the contracts. Indeed, as to some the minimum actual value was probably in excess of the contract maximum. Moreover, animals from certain sections of the country were more valuable than like animals from other sections, owing to market demand and to grazing or feeding conditions at the place of origin. Complainants contended that if any maximum value be placed on steers it should be fixed at \$120, and the representative of Iowa interests said in substance that they wanted this or nothing, as it is the fair average value of Iowa steers. The percentage of increase in rate for excess value has varied from 10 to 25 per cent of the released rate for each 100 per cent or fraction thereof of excess val-

ue. These excess rates for excess value had seldom been used. It had long been the claim of the carriers that the amounts paid by them for loss and damage incident to the transportation of live stock were disproportionately high compared with the loss and damage claims incident to the transportation of other freight. It did not appear, however, that all such claims were affected by these particular contracts. A large proportion—perhaps 85 per cent in amount—was on account of loss of market and incidental shrinkage in weights and value of the live stock. Such losses never did and never could equal the valuations named in the contracts. Only about 15 per cent of the total claims paid by the carriers for loss of or injury to live stock were, therefore, in any way affected by the rules and regulations involved. The amount of money actually paid by the carriers because of such loss or injury did not average more than 25 cents per car. During the last two years long established insurance companies entered the business of insuring shipments of live stock in transit. Their policies protected against loss by death or other total loss in excess of legal liability therefor of the railroad or carrier caused by the wreck, derailment, fire, or lightning while on cars in transit. The rates of these companies were 50 cents per single-deck and 75 cents per double-deck car, and the indemnities specified were \$50 for each steer, \$30 for each cow, \$10 for each calf, \$10 for each hog, and \$5 for each sheep or goat. The insurance rates were flat rates per car, regardless of whether the haul be long or short. For an additional premium of 25 cents or 50 cents per car, making in all 75 cents or \$1.00 per car, the indemnity on steers was made, respectively, \$75 or \$100 per head. While there were no statistics of such insurance operations available, the testimony as to the amounts paid for commissions and overhead expenses would indicate that the business was profitable. It was of record that the average haul of live stock in the United States pays the carriers about \$50 per car in freight charges. The carriers did not contend that the excess rates charged on account of excess value were reasonable, and they offered another schedule of rates in lieu thereof. The offer was in substance that for a 3 per cent excess rate the carrier would assume a 50 per cent excess liability,

and that for a 5 per cent excess rate the carrier would assume a 100 per cent excess liability. These figures were not based upon the cost of additional insurance alone. They rested also upon the theory that the carrier's service on the higher valued animals is a more valuable service and should be compensated by a higher rate. The carrier is strictly speaking, not an insurer at all, but a bailee for hire which, in that capacity, has statutory as well as common-law obligations for the safety of property committed to its charge. Cases may arise where elements other than the amount of damages which might be recovered, as for example, the degree of care required and the value of the service to the shipper, would have a substantial bearing upon the reasonableness of rates graded according to value, as well as of other rates. Applying the principles enunciated in *The Cummins Amendment*, *supra*, modified as indicated above, to the present record, it was held (1) that, taking each class of animals by itself and making due allowance for the minimum, maximum, and average values of each as shown by the record, the scheduled valuations carried by the carriers in their live-stock shipping contracts were unjustly and unreasonably low and not representative of the average actual values of the animals shipped thereunder; (2) that rates for the transportation of any animal specified in the following table, the actual value of which does not exceed the following amount, to wit:

Each horse or pony (gelding, mare, or stallion), mule, jack, or jenny .....	\$150
Each colt, under 1 year .....	75
Each ox, bull, or steer .....	75
Each cow .....	50
Each calf .....	20
Each hog .....	15
Each sheep .....	5

are, and will be for the future, unreasonable to the extent that such rates exceed the present rates based upon the present scheduled valuations; (3) that excess rates for excess valuations are unjustly and unreasonably high; (4) that reasonable rates for the transportation of any animal of actual value exceeding the



amount specified in the foregoing table will exceed such present rates by not more than 2 per cent of the present rates for each 50 per cent or fraction thereof of actual value over and above that named in such table.<sup>88</sup>

The rule of the common law is that a carrier is an insurer of the goods intrusted to him for transportation, except as against the act of God and the public enemy. This rule arose because the shipper surrendered control and dominion over the property, and on account of the difficulty in proving the negligence of the carrier; but early in England stipulations in contracts of affreightment were made relieving the carrier from this strict liability, and these stipulations were held good by the courts, provided they did not relieve the carrier from liability for his own negligence; and generally in this country it is the law that the carrier can by contract limit his common-law liability, except for negligence. In New York, however, it is the law that a carrier could relieve himself from liability even for his own negligence. But such contracts are not favored, and in order to relieve the carrier from liability for his own negligence the language must be explicit and the intention clear. General words will not suffice.<sup>89</sup> In the federal courts, it is well settled that a contract by a common carrier relieving him from liability for his negligence is against public policy and void.<sup>90</sup> But, on the other hand, stipulations requiring claims to be presented within a certain time are held by the federal courts not contracts against negligence, but conditions precedent to suit affecting, not the carrier's liability, but the shipper's remedy, and when the time is reasonable such stipulations are held by the federal courts to be valid and binding.<sup>91</sup> However, in any action for loss or damage,

88. *Iowa R. R. Commrs. v. A. T. & S. F. Ry. Co.*, 36 I. C. C. 79.

89. *Nichols v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 28 N. E. 394; *Brewster v. N. Y. C. & H. R. R. Co.*, 145 App. Div. 51, 129 N. Y. Supp., 368; *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 633, 635.

90. *Cau v. T. & P. R. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct., 148, 57 L. Ed. 314, 44 L. R. A. (N. S.), 257.

91. *Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct., 278, 45 L. Ed.

the carrier is entitled to prove that it had filed its schedule of rates, rules and regulations with the Interstate Commerce Commission, that they were published and kept posted as required by the Interstate Commerce Act with the result that the shipper was bound to know their contents, and cannot plead ignorance on that point.<sup>92</sup> Under an interstate shipment, the contract of the initial carrier fixes the liability of the parties executing the contract, as well as that of the intermediate and connecting carriers, and under the law such connecting carriers become the agents of the initial carrier, and are charged with the duty of carrying out the contract of their principal, with no right or power to ingraft new conditions or stipulations on the contract already lawfully made and executed, binding them to fully perform their part of the contract of carriage under the terms of such contract, and therefore an attempt by an intermediate carrier to exempt the carriers from liability by means of a contract which it induces the shipper to sign during the transportation barring a claim for damages unless within 30 days after the injury, is invalid under the Carmack Amendment.<sup>93</sup> Where the actual value is less than the contract limit the shipper, of course, is protected, but the carrier has never been liable for more than the actual value.<sup>94</sup> However, the fact that the shipper knows that he would be required to sign the bill of lading after a train containing his shipment of perishable produce arrives at a certain place, does not, as a matter of law, destroy a prior oral contract he has made.<sup>95</sup> Therefore an

419; *Southern Express Co. v. Caldwell*, 21 Wall, 265, 22 L. Ed. 556; *The St. Hubert*, (D. C.), 102 Fed. 362; *Metropolitan T. Co. v. Toledo, St. L. & K. C. R. Co.*, (C. C.), 107 Fed. 629; *The Westminster*, 127 Fed. 680, 62 C. C. A. 406; *The Arctic Bird*, (D. C.), 109 Fed. 167; *M. K. & T. R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct., 397, 57 L. Ed. 690. And such is the general rule in this country. *Houtz v. Union P. R. Co.*, 17 L. R. A., (N. S.), 628, note; 5 Am. & Eng. Enc. of

Law, (2nd Ed.), 321; *Lynch v. N. Y. C. & H. R. R. Co.*, 153 N. Y. S. 633, 636.

92. *Zoller Hop Co. v. So. Pac. Co.*, 143 Pac. 931, 934, 935; *C. N. O. & T. P. Co. v. Rankin*, 36 Sup. Ct. 555, 241 U. S. 319, 60 L. Ed.—

93. *M. K. & T. Ry. Co. v. Ward*, (Tex.), 169 S. W. 1035.

94. *Iowa Railroad Commissioners v. A. T. & S. F. Ry. Co.*, 36 L. C. C. 79, 82.

95. *San Antonio & A. P. Ry. Co.*, (Tex. 1915), 172 S. W. 1116,

oral contract for the shipment of perishable produce prevails unless the shipper with knowledge of its contents agrees to a written contract.<sup>96</sup> A written contract signed by the agent of a shipper of perishable produce during the course of the transportation and after the shipper had made an oral contract concerning the same, is invalid where the agent did not read the contract and knew nothing of its contents.<sup>97</sup> So one who was authorized by the owner of horses to accompany them during a shipment to see that none of them got down, is not authorized, as a matter of law, to execute a contract of shipment limiting the carrier's liability.<sup>98</sup> And an agent to ship live stock is only authorized to ship at the regular rate unless the entire matter be left to him, or the circumstances be such that power to ship at a less rate whereby the carrier's liability was limited could be inferred; hence a mere showing that an agent of the shipper signed a bill of lading limiting the carrier's liability is insufficient to establish his authority.<sup>99</sup> But a shipper of goods is bound by the special contract limiting liability tendered to and received by her agent.<sup>100</sup> The agent of a shipper of a horse is bound, before signing a bill of lading, to inform himself as to its contents, and, where he signed the contract limiting the carrier's liability, and there was no fraud his principal is bound regardless of the agent's knowledge.<sup>101</sup> By force of the Carmack Amendment, the delivery to, and acceptance by, the shipper of such a bill of lading constitutes it a binding contract on his part, so far as the valid provisions thereof are concerned, even if he does not know of the stipulations contained therein, and has not by any act, except the mere acceptance of the bill, signified his assent to them.<sup>102</sup> Since the act to regulate commerce and its amendments have gone into effect, cases of

Co., v. Bracht, (Tex. 1915), 172 S. W. 1116, 1117.

96. San Antonio & A. P. Ry. Co. v. Bracht, (Tex. 1915), 172 S. W. 1116, 1117.

97. San Antonio & A. P. Ry. Co. v. Bracht, (Tex. 1915), 172 S. W. 1116.

98. Southern Pac. Co. v. W. T. Meadors & Co., (Tex. 1915), 176 S. W. 882.

99. Southern Ry. Co. v. Kimball, (S. C. 1916), 88 S. E. 14; see p. 219.

100. Foster v. Taylor, 157 N. Y. S. 571.

101. Stubblefield v. St. Louis & S. F. R. Co., (Mo. 1916), 184 S. W. 149.

102. Spada v. Pennsylvania R. Co., (N. J.), 92 Atl. 379, 381.

this character must be decided in view of the provisions of the Interstate Commerce Act and its requirement that carriers file tariffs and rates, which shall be open to inspection, and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by the courts, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances.<sup>103</sup> Contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence.<sup>104</sup> The legality of a contract for limited liability based on a reduced rate does not depend upon a valuation which shall have relationship to the actual worth of the property. Such a contract is sustained because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. The alternative rates based on value are deemed to be in force and controlling of the rights of the parties.<sup>105</sup> So the valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum.<sup>105½</sup> To permit such a declared valuation to be overthrown by evidence outside the contract for

103. *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351, 353.

Federal decisions holding valid under the Interstate Commerce Act a stipulation in a bill of lading limiting the liability of interstate carriers of live stock to an agreed value of \$100 per head for horses and mules are binding on the state courts. *Washington Horse Exchange v. Louisville & N. R. Co.* (N. C. 1916) 87 S. E. 941.

104. *New York C. R. Co. v. Lockwood*, 17 Wall, 357, 21 L. Ed. 627, 10 Am. Neg. Cas. 624), was

settled by this court in what is known as the Hart Case, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. Rep. 151; *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351, 353.

105. *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. Rep. 380; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 121, 58 L. Ed. 868, 879, 34 Sup. Ct. Rep. 526. *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278 59 L. Ed. 576, 35 Sup. Ct. 351, 354.

105½. *B. & M. R. R. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526.

the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed would both encourage and reward undervaluations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse.<sup>106</sup> Under the settled doctrine established by the United States Supreme Court, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the Federal courts. In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission.<sup>107</sup> Therefore, one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to \$50, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods is not entitled in case of loss to recover full value of the property.<sup>108</sup> So gross

106. *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351, 353.

107. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. Rep. 155; *Chicago, St. P. M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. Rep. 155; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. Rep. 267; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K.*

*& T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. Rep. 397; *Chicago, R. I. P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. Rep. 383; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; *George M. Pierce Co. v. Wells, F. & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. Rep. 351; *New York, P. & N. R. Co. v. Peninsula Produce Exch.*, 240 U. S. 34, ante, 230, 36 Sup. Ct. Rep. 230. *Southern Exp. Co. v. Byers*, 36 Sup. Ct. 410, 411.

108. *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278,

disproportion between the value of an interstate express shipment and the arbitrary value fixed in the express company's receipt does not prevent the application of the rule that the carrier may, under the Carmack Amendment, limit its liability to an agreed value made to secure the lower of two or more published rates based upon value.<sup>109</sup> The owner of a shipment of automobiles worth \$15,000 who knowingly values them at \$50 for the sake of obtaining a reduced rate is bound by such valuation in case of loss.<sup>110</sup> And any shipper who wishes to take the risk of a recovery for very much less than the value of his goods can

59 L. Ed. 576, 35 Sup. Ct. 351, 353.

109. *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351

110. *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351

A limited liability contract for the interstate transportation of live stock, based on the declared value, as distinguished from the actual value, of the animals shipped, is not ipso facto void as a contract against the negligence of the carrier, if it is fair, open, just and reasonable. *Donovan v. Wells Fargo & Co.* (Mo. 1915) 177 S. W. 839.

Where a carrier's tariff sheets and regulations published as required by Interstate Commerce Act Sec. 6, provided a rate for the transportation of horses based upon a value of \$75, with a further charge of 12 per cent, of the excess value over \$75, if, as claimed this additional charge was unreasonable and made for the purpose of forcing shippers to accept a limited liability contract, this did not entitle a shipper who accepted such a contract to recover the full value of the animal shipped; his remedy

being to pay the full sum demanded and recover back any unreasonable excess by a reparation order, as the reasonableness of the charges filed can only be contested before the Interstate Commerce Commission. *Donovan v. Wells Fargo & Co.* (Mo. 1915) 177 S. W. 839.

Under the provisions of the Interstate Commerce Commission classification No. 633, express classification No. 21, section E, "The rates named in this section do not apply when the value exceeds \$10.00 per package, or if the amount of the C. O. D. on any shipment exceeds \$10.00 the value must be marked on the package by the shipper and entered on the receipt. The notation 'Value not exceeding \$10.00,' written or stamped by the shipper on the package and receipt, will be accepted as a sufficient declaration of value." Further, it is unlawful to charge section E rates on a package on which the value is not marked, and "Agents must decline to receive any packages for transportation at these rates unless the rules as to marking are strictly complied with." In the present case an unmarked package, with no written or stamp-

ed indication of its value, was accepted, in violation of the foregoing rule, by the agent of the carrier, and the carrier thereby assumed the risk of loss in the carriage, with liability to pay the full value of the shipment. *Southern Express Co. v. Essig Bros.* (Ga. 1916) 87 S. E. 1090.

A stipulation of limited liability in a contract for the transportation of live stock will not be enforced, where the carrier exacted more than the rate allowed by law, though the contract on its face shows an agreement to transport it at a reduced rate in consideration of the agreement for limited liability. *Kolkmeyer v. Chicago & A. R. Co.* (Mo. 1916) 182 S. W. 794.

A bill of lading for an interstate shipment providing that, in consideration of a reduced rate a shipper of live stock should not recover more than \$100 for each horse or mule killed, is valid. *Jones v. Louisville & N. R. Co.* (Mo. 1916) 182 S. W. 1064.

Where an interstate bill of lading fixed the recovery for death of horses at \$100 in consideration of a reduced rate, the fact that the owner receipted for the injured animal on representations by the local agent of the carrier that it was liable will not warrant recovery of expenses in attempting to cure the horse. *Jones v. Louisville & N. R. Co.* (Mo. 1916) 182 S. W. 1064.

A recital in a contract that a reduced rate was charged in consideration of a limited valuation prima facie establishes that fact. *Stubblefield v. St. Louis & S. F. R. Co.* (Mo. 1916) 184 S. W. 149.

Where goods were shipped, the receipt stipulating that the express company should not be liable in any event for more than \$50 on any shipment of 100 pounds or less, etc., and the goods were stolen by the carrier's employees, the shipper could not recover therefor in excess of the stipulated amount. *D'Utassy v. Barrett*, 157 N. Y. S. 916.

Since the Carmack Amendment, it has been repeatedly held that, as was the case previous to that amendment, stipulations as to value in a contract of shipment preclude a shipper from showing that the actual value was greater than that declared at the time of fixing the rate. *D'Utassy v. Barrett* 157 N. Y. S. 916, 917.

Where a bill of lading for an interstate shipment declared that recovery for horses and mules should be limited to \$100 per head, the true value of the animals at the point of shipment should be ascertained to determine the damage; the provision merely limiting liability. *Washington Horse Exchange v. Louisville & N. R. Co.* (N. C. 1916) 87 S. E. 941.

Where the evidence showed that the contract limiting the liability of the carrier for the shipment of horses was executed by the shipper as soon as they arrived at a junction point and immediately before they started on, and the shipper had not time to read the contract and did not know of the contents, and there was no evidence of a reduced rate or other consideration for the limited liability, it was proper to submit to the jury the question whether the contracts were valid. *Southern Pac. Co. v.*

have the benefit of any such reduced rate as is published.<sup>111</sup> But when a shipment is tendered to a common carrier in good order for shipment, it is the duty of the common carrier to receive and ship it, and the common carrier is required to do so, and receive

W. T. Meadors & Co. (Tex. 1915) 176 S. W. 882.

A stipulation in a contract for shipment of live stock that the shipper would load the stock, care for and attend them while they were in the stockyards, and that the carrier should not be liable for any loss or damage while the stock were in the shipper's charge, is invalid. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361.

Under Rev. St. Arts. 708, 710, forbidding a carrier from limiting its responsibility otherwise than it existed at common law, a stipulation in a contract of shipment that the shipper could not hold the railroad liable for injuries to live stock because of heat, suffocation, or other results of being overcrowded in the cars, and that any injury should be presumed to have resulted from overloading, is invalid. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361.

In an action for injuries to an interstate shipment of cattle, where the carrier relied on a contract made under authority of the Carmack Amendment, claiming limitations of liability were in consideration of a reduced rate, the carrier has the burden of proving that the limitations were reasonable and supported by consideration, and were not a subterfuge to escape liability for negligence. *Panhandle*

& S. F. Ry. Co. v. Jones (Tex. 1916) 182 S. W. 1.

Testimony as to the condition of horses when received at their destination is admissible in an action for damages for rough handling and undue confinement against a railroad company, which carried the animals only part of their journey, and which limited its liability to carriage on its own line, for in such case the damages must be determined with reference to depreciation in value to the horses at point of destination. *Texas & P. Ry. Co. v. McMillen* (Tex. 1916) 183 S. W. 773.

A bill of lading, requiring the shipper to give special notice of claims, provided that, whereas the carrier transported live stock at less than its tariff rates when its liability was limited by contract, it was agreed that the carrier would transport one car load of stock as per tariff and rules in effect on date of shipment at the through rate of tariff per car, the same being a special rate less than the regular tariff rate applying on shipments not covered by special conditions. The bill of lading mentioned no other tariff. Held, that the expression "tariff rate" meant the usual rate, and hence the bill of lading showed no reduction affording a consideration to give validity to the special contract. *Botts v. St. Louis & H. Ry. Co.* (Mo. 1915) 177 S. W. 746.

111. *George N. Pierce v. Wells,*



for its service the usual freight charges. The shipper has the right to ship the articles unreleased, and recover full damages for any loss or damage that occurs, and the full freight charges must be paid. However, the parties have the right, in consideration of reduced rates, to release the property shipped and limit the liability; but a contract must be made to this effect, or the shipper's attention must be called to what has been done, or intended to be done, and he must assent thereto. A common carrier has no right to limit its liability to the shipper (for loss or injury) to the property shipped without the consent or assent of the shipper. When property is tendered for shipment, it is presumed that the shipper desires to ship it unreleased, pay full freight charges, and collect for loss or damage full value. It is for the shipper to determine whether he will release the shipment, pay a less freight charge, and collect a limited value in case of loss or damage. He can contract to do this, or if his attention is called to the fact that it is being done, and he consents or assents to it, he will be bound. A railroad will not be allowed to make a one-sided contract to limit its liability to a shipper without the shipper's consent. It is for the shipper to direct whether his shipment is to be shipped "released" or "unreleased." "To hold otherwise would be unreasonable and farcical, and open the door to injustice and fraud."<sup>112</sup>

*Fargo & Co.*, 263 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct., 351, 354.

Where a carrier had a rate for the transportation of horses fixed upon a value of \$75 with an additional charge of 12 per cent of the excess value above \$75, a contract limiting to \$75, thereby declared to be the value of the horse, was not a violation of the Interstate Commerce Act, and the carrier was not liable for the full value of the horse, though the carrier knew the actual value of the horse and that it largely exceeded the declared value when the contract was made; there being no collusion between the shipper and the carrier's agent

to declare a false value for the purpose of procuring a quasi rebate or preferential rate. *Donovan v. Wells Fargo & Co.* (Mo. 1915) 177 S. W. 839, 840.

112. *Southern Ry. Co. v. Kimball*, (S. C. 1916), 88 S. E. 14, 15; *C. N. O. & T. P. Ry. Co. v. Rankin*, 36 Sup. Ct. 555; 241 U. S. 319, 60 L. Ed.—

Under the Interstate Commerce Act, an interstate carrier may file two rates, one a regular rate in which its common law liability is preserved, and the other a lesser rate based on an agreed valuation, but such rates must be open to all the public, and where the carrier

So where goods shipped under a released rate carried in the uniform bill of lading are destroyed while in the railroad's warehouse at destination, the carrier is not liable for more than the limited liability specified in the bill of lading.<sup>113</sup> The theory being that since it is no longer open to question if the loss had occurred in the course of transportation upon the carrier's line, the

relied on a limitation of liability in the bill of lading claiming a less rate was charged, an instruction requiring the jury to find as a condition to the limitation that plaintiff received service at a less rate than other persons is improper. *Stubblefield v. St. Louis & S. F. R. Co.* (Mo. 1916) 184 S. W. 149.

Under the Interstate Commerce Act, a bill of lading issued upon receiving an interstate shipment of household goods for carriage at a lower rate on an agreed value not exceeding \$10 per 100 pounds, which classification was explained to the shipper who elected such rate, was effective to limit the shipper's recovery. *De Rochemont v. Boston & M. R. Co.* 157 N. Y. S. 177.

Where a carrier has properly made, published, and filed with the Interstate Commerce Commission two rates for the shipment of live stock, one based upon the execution of a special contract referred to in the rate sheet so filed, and a second higher rate based upon the unrestricted liability of the carrier, held, that a shipper is charged with knowledge of the existence of the two rates, and that he has a right to exercise his option as to which rate he will pay, and under which liability of the carrier he will ship. *St. Louis & S. F. R. Co. v. Taliaferro* (Okla. 1916) 156 Pac. 359.

When a shipment is delivered to a common carrier, it must be received and transported for the usual freight charges, and, though the parties have the right in consideration of reduced rates to limit the carrier's liability, a contract must be made to this effect, and the shipper's attention called to a stipulation in the bill of lading limiting liability. *Southern Ry. Co. v. Kimball* (S. C. 1916) 88 S. E. 14.

Where a carrier had published a tariff of interstate rates on shipments of live stock, which contained two rates, a higher one for shipment at the carrier's risk, and a lower one for shipment at an agreed valuation and limitation of damages, and a shipper exercised his option by demanding the higher rate, the carrier cannot escape full liability for damages because of the fact that the agent refused to accept the shipment at the higher rate and to mark the contract accordingly, since by the exercise of the shipper's option the contract became one at the carrier's risk, regardless of the terms of the bill of lading, and the carrier could have collected the higher rate at destination. *Chicago R. I. & G. Ry. Co. v. Core* (Tex. 1915) 176 S. W., 778.

113. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 36 Sup. Ct., 177, 180, 239 U. S. 588, 60 L. Ed.—

limitation of liability agreed upon with the initial carrier, for the purpose of securing the lower of two rates of freight, would have been binding upon the shipper, in view of the Carmack Amendment, it should equally inure to the benefit of the carrier in its capacity as warehouseman.<sup>115</sup>

5. (a) **Limitation of Liability in Case of Fire.** The general principles covering damages through loss by fire have been discussed elsewhere.<sup>115½</sup> While the bill of lading contains a provision limiting liability in case of fire, this limitation has not yet been construed with reference to the Cummins Amendment. However, it was held that a provision in the bill of lading by which the carrier limits its liability against loss by fire not attributable to its negligence is valid under the Carmack Amendment.<sup>116</sup>

6. **Invoice Price Under Bill of Lading.** The Interstate Commerce Commission in its investigation of the Cummins Amendment asked this question and answered it as follows: May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment? It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations. The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time

115. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed.—, 36 Sup. Ct. 177, 179.

115½. See p. 86.

116. *Central of Georgia Ry. Co. v. Patterson*, (Ala. 1915), 68 So. 513, 514.

and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.<sup>116½</sup>

This really only reiterates the prior law. It had hitherto been held that Section 3 of the Uniform Bill of Lading providing that the liability of the carrier of goods for any loss or damage should be computed on the basis of the invoice price of the shipment at the time and place of shipment is valid.<sup>117</sup> However it had been

116½. The Cummins Amendment, 33 I. C. C. 682, 693.

117. D. & R. G. R. Co. v. Peterson Grocery Co., (Colo. 1915), 147 Pac. 663, 665; Zoller Hop Co. v. So. Pac. Co., 143 Pac. 931; Grubbs v. Atlantic Coast Line R. Co., (S. C. 1915), 85 S. E. 405; Spada v. Pennsylvania R. Co., (N. J.), 92 Atl. 379, 381; Ullman v. C. & N.W. Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949; Willard v. C. & N. W. Ry. Co., 150 Wis. 234, 136 N. W. 646; Cohen v. M., St. P. & Ste. M. Ry. Co., 155 N. W. 945, decided January 11, 1916; Inman v. Seaboard A. L. R. Co. (C. C.) 159 Fed. 960; Davis v. New York, O. & W. R. Co., 70 Minn. 37, 72 N. W. 823; 4 R. C. L. 930; Wegener v. Chicago & N. W. Ry. Co. (Wis. 1916) 156 N. W. 201, 202.

Where the bill of lading covering a shipment of poultry provided that, "The amount of any loss or damage for which any carrier is liable shall be computed on the

basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the time and place of shipment under this bill of lading, unless a lower value has been represented," etc., the measure of damages for loss of part of the shipment and damage to the rest was the market value at the time and place of shipment, plus freight, drayage, and commissions, and not the market value at the place of destination. Wegener v. Chicago & N. W. Ry. Co. (Wis. 1916) 156 N. W. 201.

When the bill of lading of an interstate shipment contains a condition that the amount of any loss or damage for which the carrier is liable "shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charge, if prepaid, at the place and time of shipment," it is proper for the judge to instruct the jury that, if the carrier

stated that a provision in a bill of lading that loss or damage shall be computed on the basis of the invoice price to the consignee at the time and place of shipment is only valid when based upon a reduced rate; in fact, only when such rate is in force, is the value of the property at destination the proper measure of damages.<sup>118</sup> But this cannot be regarded as the law. And it also had been held, although section 3 of the uniform bill of lading provides that the measure of damages is the invoice price of the shipment including freight charges if prepaid at the place of shipment, yet where the consignee is compelled to pay the freight before being allowed to inspect the goods at the place of delivery, such charges should be considered in determining the amount of damages for injury to the shipments.<sup>119</sup>

**7. Export and Import Shipments.** The question was asked: Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States? The Commission said this must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a non-adjacent foreign country, or from a nonadjacent foreign country to a point in the United States.<sup>120</sup>

**8. Goods Hidden from View.** In the proviso, "that if the goods are hidden from view by wrapping, boxing, or other means, and

was liable, the plaintiff was entitled to recover the freight paid by him as a part of his damages. *Carr v. Pennsylvania R. Co.* (N. J. 1916) 96 Atl. 588.

Under the Carmack Amendment, a stipulation in a bill of lading of animals that, in case of loss of any of the animals from any cause for which the carrier is liable, the value thereof shall be its actual cash value at the time and place of shipment, not to exceed a specified

sum per head, is valid, and governs the assessment of damages. *Galveston, H. & S. A. Ry. Co. v. Carmack* (Tex. 1915) 176 S. W., 158.

118. *K. C. & M. Ry. Co. (Ark.)*, 170 S. W. 565, 567.

119. *D. & R. G. R. Co. v. A. Peterson Grocery Co.*, (Colo. 1915), 147 Pac., 663, 665; and see *Trakas v. So. Ry.* (S. C. 1915) 86 S. E. 492.

120. The Cummins Amendment, 33 I. C. C. 682.

the carrier is not notified as to the character of the goods," the shipper may be required to state their value in writing, and the carrier only be liable for such value, what is the proper interpretation to be placed upon the words, "and the carrier is not notified as to the character of the goods?" Some argue that the word "character" means nothing more than a statement of the ordinary name by which the commodity is known. On the other hand, it is urged that knowledge as to what the commodity is, is necessary in order to apply to it any transportation rate, and that therefore the word "character" properly means more than the mere name of the commodity. It has been suggested that the real and proper meaning would be indicated by recasting the language as follows: Provided, however, that if a commodity in the course of transportation is hidden from view by wrapping, boxing, or other means, so that the carrier can not know its character, that is to say, its grade, quality, and condition, it may, with the approval of the Commission, publish and maintain rates based on value and require the shipper to state in writing the value of any shipment made, and beyond the value so stated the carrier shall not be liable. It has also been suggested that in view of the fact that the articles dealt with in this proviso are to be distinguished on the basis of value, the value becomes a peculiar quality of the property and the word "character" should be construed as including value, and that when the shipper notifies the carrier of the character of the goods the notice is incomplete unless the value is stated as a necessary element in pointing out the character of the goods. Another suggestion is that when common experience or knowledge does not clearly establish the nature of the goods, or the view is hidden by boxing, wrapping or other means, and the carrier is not notified as to the true character of the goods, it may exercise the right to require the shipper to state in writing the value of the property. The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof or the rate applicable thereto has not been denied by the act or withdrawn by this amendment. The right in certain instances to make varying rates upon a given article or commodity dependent upon its true value being recognized, and it being impossible for the carrier's agent to

know the true value of the shipment unless it is declared by the shipper, and in view of the fact that the ordinary name of the commodity is essential to the application of any transportation rate whatsoever, it seems that the word "character" as used in this proviso must include the true and actual value as stated by the shipper. The word "character" as here used clearly relates primarily to value, or to those qualities affecting value, and when the entire proviso is considered the meaning seems to be that if the qualities affecting value of the goods are hidden from the carrier's view, or are not known to the carrier, the proviso applies. It is a well-settled rule of statutory construction that the word "and" may be read as "or" in deference to the meaning of the context. If the word "and" in the proviso is read as "or," the meaning is reasonably clear, whereas if the letter of the statute is adhered to the meaning is doubtful and difficult to determine. In those instances in which the carrier desires to limit its liability to the value of the property as specifically stated in writing by the shipper, the rate must be based upon the declared value and be so published; but the Commission apparently must determine in advance of such publication that the commodity is one the value of which can not be known to the carrier from ordinary sources or reasonable inspection, and to which rates based on declared value may be applied in connection with which the carrier's liability is limited to the value so declared. In determining that question the inquiry is whether or not the commodity is one the value of which is peculiarly within the knowledge of the shipper. If it has a definite market value, or its value depends upon facts of which the carrier has equal knowledge with the shipper, the "character" of the shipment is known to the carrier, and the proviso does not apply. Congress did not affirmatively recognize any rates based upon declared value other than those authorized by this proviso. This, of course, does not mean that commodities may not be reasonably classified according to value and be subject to different rates applicable to different grades of the same commodity, which is a different matter from limiting the liability to the declared value. When the goods are not hidden from view, and the carrier is advised as to their character, all contracts or agreements purporting to limit the

liability of the carrier for loss or damage caused by it are made void. A carrier, since the Cummins Amendment is in effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause. It follows further that the rates provided by such tariff may be proportionate to the risk assumed. This provision of the statute as to goods concealed from view and of the character of which the carrier is not advised clearly prescribes the right of carriers under the direction or approval of the Commission to provide for a graduation of rates in accordance with the declared value of the property transported. The liability provided by the rates so established by the Commission is applicable no less to instances of loss or damage chargeable to the negligence of the carrier than to those occasioned by causes beyond the carrier's control. But the carriers may not contract to limit their liability for loss, damage, or injury caused by them to property the character of which is manifested by the shipment itself or otherwise disclosed. In this connection it has been suggested that the carrier might provide that in the event the shipper refused to declare the value the higher rates would apply. This suggestion can not be approved. If the rate is lawfully conditioned upon the value as declared by the shipper, it is as much the shipper's duty to declare the true value of the shipment as it is his duty to declare the name of a commodity tendered for shipment as to which there are no different rates. It is important to keep in mind that the carriers are not prohibited from



making different rates dependent upon the value of different grades of a given commodity; that, except as covered by the Cummins Amendment, including approval of the rates by the Commission, the carrier is subject to all of the liabilities imposed by that amendment; and that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates, and is subject to the penalty prescribed in, section 10 of the Act. The carrier would also be subject to the same penalty in such a case if, having knowledge that the value represented is not the true value, it nevertheless accepts the shipper's representation as to value for the purpose of applying the rate.<sup>121</sup>

9. **Special Damages.** One phase of traffic law which has caused more or less confusion has been the recovery of special damages. Thus a contractor holds men at a point awaiting the arrival of construction material which is delayed in transit. He has gone to considerable expense in the matter, but cannot recover the wages of his men which accrued while waiting for the material to arrive. This is so because such wages are in the nature of special damages which can not be recovered unless the carrier had notice before it accepted the shipment that such damages might accrue as the result of its negligence. The rule has therefore been laid down to be that in the absence of notice to the carrier special damages cannot be recovered. Therefore where a carrier unreasonably delays a shipment of cotton ginning machinery during the ginning season, it is not chargeable with implied notice that the consignee was going to operate a public cotton gin and he therefore cannot recover profit on the cotton which he might have ginned had the machinery arrived on time.<sup>122</sup> However, profits may be recovered as damages, but such profits must be alleged and proved. In order to recover, it was necessary to prove that the shipper would have made a certain amount of profit on the shipment had it not been negligently held by the carrier, and that the carrier knew the purpose for which plaintiff had ordered the shipment. These facts being necessary to establish the

121. The Cummins Amendment,  
33 I. C. C. 682.

122. *Illinois Cent. R. Co. v. Brothers*, (Ala. 1915), 67 So. 628, 629.

liability of the carrier, it was equally necessary that they should have been alleged.<sup>123</sup> In another case a grower of rice purchased coal for fuel for an engine which he used to pump water for his growing crop. Owing to a delay in transportation, the fuel arrived so late that his crop was ruined. While the freight was at an intermediate station, he notified the carrier what he wanted it for and asked it to hurry up the shipment which it did not do. It was held that since notice that special damages would accrue was not given until after the shipment had moved, they were not recoverable.<sup>124</sup> This is because notice or information of circumstances, whereby special damages might arise, given after the contract was made and during the period of transportation, is not sufficient to charge the carrier with liability for such special damages.<sup>125</sup> So a buyer of coal for use in running an engine pumping water for his growing rice, cannot recover from the carrier special damages for delay in transporting the coal causing loss of his crop, in the absence of any notice of special damages given prior to or at the time of the contract of shipment, though notice was given during the delay and while the car of coal was standing at a way station, and though the buyer requested the seller to hurry up the shipment, which request was communicated to the carrier's agent.<sup>126</sup> But it has also been stated there may be a recovery for special damages arising on account of negligent delay in making a delivery after the transported article has reached its destination, if notice was given after the arrival of the article at destination.<sup>127</sup>

Where the proximate result of the delay is the loss of the use of the goods and the carrier has notice or knowledge of facts that would apprise it the consignee would sustain loss in that particular, the measure of damages is the value of the use during the time of delay. Such has been held to be the ordinary damages

123. *Foster v. I. & G. N. Ry. Co.*, 681.

(Tex. 1915), 175 S. W. 762, 763.

124. *C. R. I. & P. Ry. Co. v. Thomas*, (Ark. 1915), 176 S. W. 681.

125. *C. R. I. & P. Ry. Co. v. Thomas*, (Ark. 1915), 176 S. W. 681.

126. *Chicago, R. I. & P. Ry. Co. v. Thomas*, (Ark. 1915), 176 S. W. 681.

127. *Chicago, R. I. & P. Ry. Co. v. Thomas*, (Ark. 1915), 176 S. W. 681.

where the goods consist of machinery ordered for use and not for resale, and in cases where a passenger sues the carrier for delay in delivering his baggage.<sup>128</sup> But it has been held that while a carrier is liable for deterioration in goods unreasonably delayed, it is not liable for special damages not contemplated at the time of shipment; such as deterioration in eggs because of delay in a shipment of material to be used in constructing egg packing boxes.<sup>129</sup> Under certain circumstances damages may be recovered as within the contemplation of the parties, though they are in excess of those which would ordinarily be considered the natural and probable consequences of the default of the carrier. In all such cases the carrier must have had notice of the special circumstances which would likely give rise to the damages. "And this notice should be given when the goods are delivered for transportation. Subsequent notice, however, of the effect of further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of his negligence in not tracing and finding goods."<sup>130</sup> So in an action for damages occasioned by unnecessary and unreasonable delay in the shipment of freight only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into contemplation of the parties to the contract of carriage, and if the shipper expects to charge the carrier with any special damages, he must communicate to the carrier, at or prior to the time of shipment, all the facts and circumstances of the case which do not ordinarily attend the carriage of such freight, or the peculiar character and value of the property carried; otherwise, such peculiar circumstances cannot be contemplated by the carrier.<sup>131</sup>

128. 6 Cyc. 449; 5 Ruling Case Law, 223, sec. 833; Illinois Cent. R. Co. v. Brothers, 67 South. 628, and authorities supra; L. & N. R. Co. v. Cheatwood, (Ala. 1915), 68 So. 720, 721.

129. Southern Ry. v. Moody, 169 Ala., 294, 53 So., 1016.

130. I. C. R. Co. v. Brothers, 67 So. 628; 6 Cyc. 450; Southern Ry.

Co. v. Lewis, 165 Ala., 451, 51 So. 863; L. N. R. Co. v. Cheatwood, (Ala. 1915) 68 So. 720, 721.

131. M. K. & T. Ry. Co. v. Foote, (Okla. 1915), 149 Pac. 223.

In an action against a carrier for failure to deliver a shipment of sugar, evidence where it is shown the carrier knew that the sugar had either been resold or was for

And prospective profits cannot be recovered unless by the terms of the contract, or by direct notice, they are within the expectation of the parties, so that it plainly appears that they were within the contemplation of the parties when the contract of shipment was made.<sup>132</sup> One seeking to recover special damages for breach of contract must show that such damages were within the contemplation of both parties to the contract; otherwise, he can only recover such damages as in the usual course of things flow from the breach.<sup>133</sup> So when certain dresses which were to be sold at retail were negligently delayed in transit, loss of profits could not be recovered unless specially pleaded.<sup>134</sup> So where damages for failure to furnish cars to transport lumber are special in their nature and not such as would usually and probably result from delay in the transportation of timber, a carrier could not be held liable for such damages because it had no notice they would result.<sup>135</sup> Therefore if special damages, such as profits, are sought, there must be allegation and proof of such special damages.<sup>136</sup> But the carrier is liable for special damages resulting from delay, where it has notice that such damages will occur.<sup>137</sup> And there may be a recovery for special damages arising on account of negligent delay in making a delivery after the transported article has reached its destination, if notice was given after the arrival of the article at destination.<sup>138</sup>

immediate sale and that prompt delivery was most important, and so consequential damages, as loss of profits on resale, may be recovered. *Riley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.* (Mo. 1916) 184 S. W. 915, 916.

132. *Central Trust Co. v. Savannah & W. R. Co.*, (C. C.), 69 Fed. 683; *Foster v. Cleveland, etc., R. R. Co.*, (C. C.), 56 Fed. 434; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Katz v. C. C. C. & St. L. R. R. Co.*, supra, and cases there cited; and *Rosenberg v. D. L. & W. R. Co.*, 88 Misc. Rep., 1, 150 N. Y. S., 75; *Detmer-Wallen Co. v. D. L. & W. R. Co.*, 153 N. Y. S.

288, 289.

133. *M. K. & T. Ry. Co. v. Foote*, (Okla. 1915), 149 Pac. 223.

134. *Foster v. I. & G. N. Ry. Co.*, (Tex. 1915), 175 S. W. 762, 763.

135. *Calvit v. McFadden*, 13 Tex. 324; *Express Co. v. Darnell*, 62 Tex. 640; *Railway Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Beaumont, S. L. & W. Ry. Co. v. Moore*, (Tex. 1915), 174 S. W. 844, 847.

136. *Foster v. I. & G. N. Ry. Co.*, (Tex. 1915), 175 S. W., 762, 763.

137. *Armstrong v. C. M. & St. P. Ry. Co.*, (S. D. 1915), 152 N. W. 696, 697.

138. *C. R. I. & P. Ry. Co. v.*

10. **Interest on Claims.** On account of the long period of time loss and damage claims frequently pend, sometimes for several years before decisive action is taken by the carriers, and then suit dragging along several years more, the collection of interest on claims becomes important. Generally the collection of interest depends upon the statutes of the particular state and hence any general rule must be considered in the light of such a situation. It has been stated, interest may be recovered in cases where the suit proceeds on the common law liability of the common carrier for the loss of property in its possession for transportation, if other elements of liability are present. Indeed such seems to be the general rule on the subject. It is well settled (aside from any provision in the bill of lading) that the measure of the damages for the loss of the goods by the carrier, when he is liable for such loss, is generally the value of the goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, deducting however, the unpaid cost of transportation, but adding such incidental damages as naturally and proximately flow from the loss. This, at least in the great majority of cases, will be the extent of the loss of the shipper, and of the compensation for its breach, which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract. In certain states interest is recoverable in cases of this character as a matter of right. Generally speaking, such interest is to be recovered from the time the property should be delivered at point of destination. However, where the suit is instituted subsequent to that time, it is competent to give interest on the value of the property lost from the date of the institution of the suit.<sup>139</sup> So a carrier which sells property because of the refusal of the consignee to receive it, is chargeable with interest on the proceeds in excess of the freight during the time they are with-

Thomas, (Ark. 1915), 176 S. W. 681.

139. Dunn v. Hannibal & St. J. R. Co., 68 Mo. 268; Gray v. Mo. R. Packet Co., 64 Mo. 47; Lachner

Fros. v. Adams Express Co., 72 Mo. App. 13, 21; Goodman v. Missouri, K. & T. R. Co., 71 Mo. App. 460, 464; Smith v. Whitman, 13 Mo. 352; Humphreys v. St. Louis

held from the shipper.<sup>140</sup> But it has been stated in an action against a carrier for damages on account of injury to or destruction of property in transit, that interest is not recoverable.<sup>141</sup>

11. **Baggage.** Do the terms of the Cummins Amendment apply to the transportation of baggage? This must apparently be answered in the affirmative. Transportation of baggage is a part of the contract for transportation of the passenger. The carriers have always limited their liability for loss of or damage to baggage. The baggage check is the carrier's receipt for the baggage. No other is required by the terms of the Carmack Amendment.<sup>141½</sup> The conditions attached to the carrier's liability are stated in the fare schedules and on passage tickets of contract form. In *National Baggage Committee v. A. T. & S. F. Ry. Co.*, 32 I. C. C. 152, the Commission considered the carriers' rules relative to charges and liabilities in the transportation of baggage and prescribed certain reasonable regulations, including reasonable insurance charges upon baggage declared to be of greater value than the maximum limit provided in the schedules and contract for carriage. All ordinary personal or sample baggage is hidden from view by boxing, wrapping, or other means, and the amended law seems clearly to recognize the carrier's right to fix conditions and terms applicable to the transportation of baggage dependent upon the value as declared by the person offering the baggage for transportation.

The rule covering the measure of damages for the loss of baggage is somewhat different than that in the case of other property. The baggage itself is often the smallest part of the loss. So it has been held that the measure of damages for a carrier's

& H. Ry. Co., (Missouri 1915), 178 S. W. 233, 236.

140. *Stevens-Scott Grain Co. v. Atchison T. & S. F. Ry. Co.*, (Kan. 1915), 149 Pac. 744.

A shipper recovering for damages to stock is entitled to recover interest from the date of damage as part of his compensatory dam-

ages. *Texas & P. Ry. Co. v. Erwin* (Tex. 1915) 180 S. W. 662.

141. *Stevens-Scott Grain Co. v. Atchison T. & S. F. Ry. Co.*, (Kan. 1915), 149 Pac. 744; *Reading v. C. B. & Q. R. Co.*, (Mo. 1915), 173 S. W. 451.

141½. *B. & M. R. R. v. Hooker*, 233 U. S. 97, 58 L. Ed., 868, 34 Sup. Ct. 526.

delay in forwarding the sample trunks of a traveling salesman is the value of the use of the property during the delay, together with the loss of time occasioned thereby; the carrier's agent receiving the trunks for transportation with knowledge of their contents and intended use.<sup>142</sup> This is so because loss of time and inability to make sales because of delay in receiving trunks containing samples will be regarded as within the contemplation of the carrier when it receives and checks a salesman's sample trunks as baggage, so as to entitle him to recover damages

142. *Kansas City M. & O. Ry. Co. v. Fugatt*, (Okla. 1915), 150 Pac. 669, 670.

As a general rule a carrier is not liable for loss of samples carried by a commercial traveler. The general rule is stated in *Moore on Carriers*, 2nd ed., page 1297:

"The samples carried in his trunk by a commercial traveler and belonging to his employer, although necessary to the object of the passenger's journey, are held not to be personal baggage, but properly mere merchandise, but a salesman's catalogue or price book is his personal baggage. Where a carrier undertakes, without extra compensation, to transport a traveling case with notice that it contains merchandise or samples, and not baggage, it will be liable for the loss thereof. And where a carrier, with a full knowledge of the character of the contents of a trunk, or that the articles therein are not properly baggage, receives the same for transportation as baggage, it will be liable therefor. But the fact that commercial travelers or others are accustomed to carry merchandise on passenger trains

without paying any more than the usual price of a ticket for a passenger, even if known to the carrier, will not render it liable for such merchandise. The mere payment of an extra charge, on account of the overweight of alleged baggage, does not convert it into freight and render the carrier liable for it as such; and where merchandise to be used in trade is packed in a trunk, and shipped as personal baggage, the carrier having no notice or knowledge of its character, no liability as a common carrier attaches. But if the trunks and this compensation are received with notice that the trunks contained property other than the baggage of the passenger, then there is evidence of an agreement, aside from the contract to transport the passenger, for a new, separate, and independent consideration, to transport such property as freight, which will render the carrier liable therefor."

To the same effect see:

*Talcott v. Wabash R. Co.*, 66 Hun (N. Y.), 456; 21 N. Y. S. 318.

*Gurney v. Grand Trunk R. Co.*, 59

therefor in case of such delay.<sup>143</sup> However, it may be stated that upon arrival of a trunk at the passenger's destination, it was the duty of the carrier to put off the trunk, and it was the duty of the passenger then to take the trunk, but, in the nature of the case, not immediately. The passenger has a reasonable time to lay hands on, and the carrier has a like time to take hands off: and until that time transpires, the trunk has not arrived, and a new relationship thereabout has not set in.<sup>144</sup> When that time has transpired it may be the law will regard the situation as amounting to a constructive delivery.<sup>145</sup> What is a reasonable time for delivery must, in some cases be determined by a jury. Where there is a dispute about what took place between the passenger and the carrier at the time the trunk left the cars, and therefore whether or not a new relationship was instituted between them, the issue of a reasonable time to deliver ought to go to a jury.<sup>146</sup>

**12. Punitive Damages.** In certain cases the courts have allowed so-called punitive damages to be recovered against carriers. These are damages allowed as a punishment in addition to the ordinary damages recoverable. They are only permitted in extreme cases. So where an express company, shipping a piano, delayed it in such a manner that a person of ordinary reason and

Hun (N. Y.), 625; 37 N. Y. S. Rep. 155; 14 N. Y. S. 321.

Scoville v. Griffith, 12 N. Y. 509.  
Hawkins v. Hoffman, 6 Hill (N. Y.), 586.

Michigan Cent. R. Co v. Carrow, 73, Ill. 348.

Weber Co. v. Chicago, etc., R. Co., 92 Iowa, 364; 60 N. W. 637.

McElroy v. Iowa Cent. Ry. Co. (Iowa), 110 N. W. 915.

Southern Kansas R. Co. v. Clark, 52 Kan. 398.

Jacobs v. Tutt, 33 Fed. 412.

Alling v. Boston, etc., R. Co., 126 Mass. 121; 30 Am. Rep. 667.

Stimson v. Connecticut River R.

Co., 98 Mass. 83; 93 Am. Dec. 140.

Rossier v. Wabash R. Co., 115 Mo. App. 515; 91 S. W. 1018.

Pennsylvania R. Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620.

Texas, etc., R. Co. v. Capps, 2 Tex. App. Cas., sec. 33.

143. Kansas City, M. & O. Ry. Co. v. Fugatt, (Okla. 1915), 150 Pac. 669, 670.

144. Spears v. Railroad, 11 S. C. 158, 188.

145. Heyman v. Railroad, 203 U. S. 270, 276, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130.

146. Harris v. Southern Ry. Co.,



prudence would have said it was a reckless disregard of the shipper's rights, the company was liable for punitive damages.<sup>147</sup>

(S. C. 1915), 85 S. E. 158, 160.

In an action for damages for delay in the delivery of a trunk, evidence as to the cost of clothing purchased to wear in the meantime, without evidence as to the value of such clothing at the time of the delivery of the trunk, is not a sufficient basis for a verdict, since the measure of damages is the difference between the cost of such clothing and its value at the time the trunk was delivered. *Lichterman v. Barrett* 157 N. Y. S. 882, 883.

In an action for damages for delay in the delivery of a trunk, the burden is on the plaintiff to show the value of the clothing at the time of delivery, not on the defendant to show such fact by way of mitigation of damages. *Lichterman v. Barrett*, 157 N. Y. S. 882, 883.

147. *Piero v. Southern Express Co.*, (S. C. 1916), 88 S. E. 269.

A son shipped his mother's

corpse by railroad, and when the box and casket containing it were being unloaded at its destination the baggageman pushed one end upon a truck about 18 inches below the door of the car, threw the other end out, and threw a heavy trunk on top of it. The shipper protested, telling him the box contained his mother's body, and the baggageman replied with profane and vulgar language, and continued to throw other trunks on the box until the thumb-screws were bent down and the sides of the box broken open, making it necessary to repair the box before the funeral. The jury returned a verdict for \$5 actual damage and \$500 punitive damages. It was held that the punitive damages were not excessive, or so out of proportion to the actual damages as to indicate passion and prejudice and should be sustained. *Wall v. St. Louis & S. F. R. Co.* (Mo. 1916) 182 S. W. 1057, 1058.

## **IX.**

### **ACTIONS AT LAW FOR DAMAGES**

- 1. Jurisdiction of Interstate Commerce Commission.**
- 2. Jurisdiction of Courts.**
  - A. In General.**
  - B. Parties.**
  - C. Pleading.**
    - Counterclaims.**
  - D. Burden of Proof.**
  - E. Competency of Witnesses.**
  - F. Admissibility of Evidence.**
  - G. Judicial Notice.**
  - H. Questions for Jury.**
  - I. Argument of Counsel.**
  - J. Instructions and Verdict.**
  - K. Appeal.**

**1. Jurisdiction of Interstate Commerce Commission.** The Interstate Commerce Commission has no jurisdiction over loss and damage claims. Hence it is not authorized to determine whether damage to a shipment of shingles was caused by the act of a carrier in reloading into two open cars.<sup>1</sup>

**2. Jurisdiction of Courts—In General.** The various amendments to the Interstate Commerce Act have not abridged the jurisdiction of either the state or federal courts to entertain suits for loss and damage to freight. In some instances state rules of evidence and procedure have been modified, and of course, state courts are bound by such modifications, but the right of the shipper to bring the suit in the first instance is not abrogated in any way. Thus section 22 of the Interstate Commerce Act permits an

1. *New York Merc. Exch. v. B. & O. S. W. R. R.*, 21 I. C. C., 536, & *O. R. R.*, 36 I. C. C. 156; *Kay Co.* 538; *L. & N. R. R. v. Scott*, 133 v. D. & R. G. R. R., 21 I. C. C., 239, Ky. 724, 729, 118 S. W., 990.  
240; *Buffalo Hardwood L. Co. v. B.*

action to be brought in a state court for the wrongful failure of a terminal carrier to deliver an interstate shipment.<sup>2</sup> So the liability fixed by the Carmack Amendment, may be enforced by a state court.<sup>3</sup>

In a typical case it appeared the shipper alleged the following, among other things. It purchased a carload of hogs and caused them to be shipped from Kelso, Tenn., to Atlanta, Ga. The hogs could have been shipped in a car 36 feet long, for which the tariff rate between those points, as published by the carriers, was \$53. Its vendor ordered a car that length for the purpose of the shipment. Under the tariff schedule, the carriers reserved the right, for their own convenience, to furnish a longer car than that called for or required by the shippers. In that event the rate of freight is the price of the car called for, when such car is sufficient to carry the shipment. The first carrier, the Nashville, Chattanooga & St. Louis Ry., for its own convenience, instead of furnishing a car 36 feet long, which would have been sufficient, furnished one 38 feet long, and this fact was duly noted on the bill of lading. The freight was prepaid, and this fact was also entered. When the car of hogs arrived at their destination, the last carrier, the defendant, refused to deliver the hogs without the payment of an additional amount of \$2.65, though notified of the facts by the shipper and against its protest; and thereby damage resulted as set out. Held, since the shipper did not contend that the fixed tariff rate was unreasonable, illegal or discriminatory, but that its vendor paid the fixed rate and had due notation thereof made by the terminal carrier, in spite of this, it refused to perform its duty as a common carrier by delivering the shipment without requiring payment of an additional and wholly illegal demand, and section 22 of the Interstate Commerce Act provides that nothing in the act shall in any way abridge or alter the remedies existing at common law or by statute. The state court had jurisdiction of the ship-

2. *W. & A. R. Co. v. White Provision Co. (Ga.)*, 82 S. E. 644, 646. *Co. (So. Dak. 1915)*, 150 N. W. 777, 778.

3. *Elliott v. C. M. & St. P. Ry.*

per's claim for damages arising from the illegal refusal of the terminal carrier to deliver freight on which the proper charges had been paid, and suit could be brought against the final carrier without joining the initial carrier.<sup>4</sup> Therefore the fact that the Interstate Commerce Commission may have recommended the payment of special damage which flows from violation of a federal law is no reason why the state court may not take cognizance of a suit based in part upon another result of that act which, when connected with many other acts of a different nature, will show a willful and malicious purpose, and give rise to this common-law cause of action.<sup>5</sup> So an action for damages for the failure of a railroad to properly run a special train as agreed can be brought in a state court and application does not first have to be made to the Interstate Commerce Commission.<sup>6</sup> But if the Commission had acted upon a live stock contract, and approved it, a shipper bringing suit thereunder must first resort to the Commission. Until it does affirmatively appear that the Commission acted upon it, the courts are free to deal with it.<sup>7</sup> However, since the uniform live stock contract has never been approved by the Interstate Commerce Commission, or referred to, or made a part of a carrier's tariff, a state court has authority to declare one of its provisions illegal and invalid.<sup>8</sup> A suit against a carrier for the negligent handling of a shipment is transitory and may be brought against the carrier in any state where proper service may be had.<sup>9</sup> And such a suit is governed by the law of the place where the negligence occurred.<sup>10</sup>

In any case where an action is brought under state statutes modeled upon the Interstate Commerce Act, decisions of the Supreme Court of the United States, construing the Interstate Act will have persuasive authority.<sup>11</sup> So section 9 of the original In-

4. *W. & A. R. Co. v. White Provision Co.* (Ga.), 82 S. E. 644, 645.

5. *L. & N. R. Co. v. Ohio Valley Tie Co.* (Ky.), 170 S. W. 633, 642.

6. *Burns v. Nevada-California-Oregon Ry.* (Nev. 1915), 145 Pac. 926, 928.

7. *Norfolk & W. Ry. Co. v. A. J. Steele & Son* (Virginia 1915) 86

S. E., 124, 126.

8. *Norfolk & W. Ry. Co. v. A. J. Steele & Son*, (Virginia 1915), 86 S. E. 124, 126.

9. *Coy v. St. L. & S. F. R. Co.*, (Mo. 1915), 172 S. W. 447.

10. *Coy v. St. L. & S. F. R. Co.*, (Mo. 1915), 172 S. W. 447.

11. *Southern Pac. Co. v. Super-*

terstate Commerce Act (24 U. S. Stats. at Large 379, c. 104), limiting jurisdiction to federal courts, relates to actions in which it is claimed the carrier has violated the Act by doing something which it forbids or has neglected to do; something which it commands should be done. It does not have reference to actions brought under the Carmack amendment, enforcing liability of the initial carrier for damages caused by negligent carriage, or to actions for such damages not brought under the Carmack amendment. Of such actions state courts have jurisdiction.<sup>12</sup> In *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, and in *C. B. & Q. Ry. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323 the Supreme Court of the United States decided writs of error to state courts in actions brought under the Carmack amendment without intimating that state courts had no jurisdiction. State courts have jurisdiction to enforce federal laws unless it is withheld directly or by necessary implication.<sup>13</sup>

**B. Parties.** Sometimes it is difficult to determine who is the proper party to maintain a suit for loss and damage. It is well settled however that the assignee or transferee of a bill of lading may sue upon any cause of action which is supported by the terms of that contract.<sup>14</sup> And no formal assignment by a partner of his interest in a partnership is necessary to enable another partner to sue alone for injury thereto. Any action showing an intent to transfer the interest to the suing partner is sufficient.<sup>15</sup> But where in an action for damage to cattle from their escape from defendant railroad's receiving pens, claimant sued both for injuries to animals owned by him individually and those owned by him in partnership with another, failing to show that his part-

ior Court, (Cal. 1915), 150 Pac., 397, 403.

12. *Smeltzer v. St. Louis & S. F. R. Co.* (C. C.) 168 Fed. 420; *Ft. Smith & W. R. Co. v. Awbrey & Semple*, 39 Okl. 270, 134 Pac. 1117.

13. *Bichlmeier v. Minneapolis, St. P. & S. S. M. Ry. Co.* 150 N. W. 508, 509.

14. *Canby v. Merchants' & Miners' Transp. Co.*, (Ga. 1915) 85 S. E. 361, 362; *Watson v. Union Pac. R. Co.*, (Mo. 1915), 178 S. W. 871, 873; *St. L. & S. F. R. R. v. Mounts* (Okla. 1914), 144 Pac. 1036.

15. *Hardesty v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1915), 179 S. W. 725.

ner had assigned to him his interest in the cattle, only showing that he himself had agreed to go ahead and sue for the whole damage to the whole shipment, he could not maintain his action for damage to the partnership live stock, since there was no showing of his partner's intention to transfer his interest in the cattle or his interest in the claim for damages to the plaintiff.<sup>16</sup> So a bailee has a right to enforce the liability of a carrier for the loss of goods.<sup>17</sup> Where goods were shipped by a manufacturer upon the order of a seller to different consignees, each purchase of goods being put in a separate package with the name marked upon same and the bill of lading taken from the railroad in the consignee's name for such goods, title to the goods passed to the purchaser

16. *Hardesty v. Atchison, T. & S. F. Ry. Co.*, (Mo. 1915), 179 S. W. 725.

17. *Litzenberg v. Cole*, 151 N. Y. Suppl. 687, 688.

While the shipper of goods delivered by her through an expressman to a steamship company for transportation could sue in her own name as an undisclosed principal from whom the consideration moved, to enforce the rights in relation to the goods the expressman acquired when acting for her, she could not affirm the contract of transportation in part and disaffirm in part, as by repudiating, in her suit for misdelivery, the bill of lading which the steamship issued to the expressman without objection and which gave the address of the consignee different from that marked on the shipment. *Porter v. Oceanic S. S. Co. of Savannah* (Mass. 1916) 111 N. E. 864.

In an action against a common carrier, whereby it is sought to recover damages for the loss of perishable goods intrusted to such carrier for shipment, alleged to have occasioned through the negli-

gent handling of and unreasonable delay by the carrier in transporting such goods, the declaration is not demurrable for failing to allege that the claimant was the owner of the goods. The consignor has the implied right to bring such action by reason of his delivery of the goods by him to the carrier and its receipt of them for carriage, especially when it is made to appear from the allegations of the declaration that the consignee was to receive and sell the goods for the claimant as the consignor. *Aultman v. Atlantic Coast Line R. Co.* (Fla. 1916) 71 So. 283.

Where claimant partnership made a large number of shipments of intoxicating liquors by defendant express company by separate contracts for each shipment, claimant's recovery in an action for the conversion of part of the shipments was no bar to a subsequent action for the conversion of the other shipments, because of a lack of identity and of subject-matter and demand in the two actions. *Daniger v. American Express Co.* (Mo. 1915) 179 S. W. 806.

upon delivery to the railroad, and when the goods were destroyed each separate consignee had a separate individual cause of action against the carrier, and the manufacturer could not maintain such action himself.<sup>18</sup> But a lumber company which is the purchaser of standing timber cannot sue a railroad which has built a spur into the timber land under a contract with the owner thereof, for failure to promptly furnish cars thereon for loading.<sup>19</sup> Since the consignee is presumed to be the owner of the property under an open bill of lading the shipper can not recover for negligence in transporting in consideration of increased freight charges in the absence of proof that he paid the freight or obtained some interest in the property.<sup>20</sup> So when the consignee pays the consignor for a shipment he takes all the right and title of the consignor to the same, and therefore the consignor has no right to assign a claim for the loss of such shipment to a third party.<sup>21</sup> Where suit is brought for injury to freight against a railroad operating by receivers, it is not necessary for plaintiff to prove the appointment of the receivers if his complaint properly alleges their appointment and the railroad does not specifically deny such statement.<sup>22</sup> But a rule where cases of eggs are received at shipping point and receipted for on other than order bills of lading as in apparent good order (contents and condition of contents of package unknown) and arrive at destination in the same apparent good condition, and show no external evidence of damage, no inspection of contents of such cases will be permitted before delivery thereof to consignee, and he will be required to accept and receipt for them subject

18. *Alabama Great Southern R. Co. v. Aultman & Co.* (Ala. 1914), 67 So. 589, 590.

19. *Beaumont, S. L. & W. Ry. Co. v. Moore*, (Texas 1915) 174 S. W., 844.

20. *Ellington & Guy v. Norfolk Southern R. Co.*, (N. C. 1915), 86 S. E. 693.

But a consignor, who has made a special contract with a carrier to transport goods, may maintain an action against the carrier for fail-

ure to deliver them within a reasonable time, or for their loss or injury, even where title passed to the consignee at delivery of the goods to the carrier. *Norfolk Southern R. Co. v. Norfolk Trunkers' Exchange* (Va. 1916) 88 S. E. 318.

21. *Southern Ry. Co. v. Brewster*, 69 So. 111.

22. *Kansas City M. & O. Ry. Co. v. Cave* (Texas 1915), 174 S. W. 872, 873.

to the same conditions under which the shipment was received for transportation, viz., as in apparent good order (contents and condition of package unknown). This can not, of course, bar consignee from suing for, and upon due proof from obtaining compensation for loss or damage caused by, the negligence of the carrier, even though undisclosed by the joint examination at delivery point and is not restricted to cases showing external evidence of damage.<sup>23</sup> It being doubtful whether a sale was complete on delivery of goods to a carrier, or only on delivery at destination, and consignee having released the carrier from liability in the consignor's favor, and authorized settlement with him, the consignor could maintain an action for delay in transportation.<sup>24</sup> Where a contract of sale allows the vendee and consignee to refuse the goods if not in good condition on arrival, the consignor's title is not divested by delivery to the carrier, and he may sue the carrier for injury to such goods.<sup>25</sup> In an action by a shipper to recover for loss of goods under the Interstate Commerce Act, requiring any interstate carrier to issue a bill of lading, and making it and any other carrier to which it may be delivered liable "to the lawful holder thereof" for any loss, the holding of the bill of lading is not prerequisite to such right of action.<sup>25½</sup> but the statute extends its remedy directly against the carrier to whom goods are delivered for shipment in behalf of such shipper, or one who has succeeded to his rights. The declaration is not subject to demurrer for failing to allege that a receipt or bill of lading was issued for the goods, and that the claimant was the lawful holder of such bill of lading.<sup>26</sup> Where claimant undertook to perform the duty of giving his deceased mother a decent burial, and assumed responsibility for all funeral expenses and the cost of transportation of the corpse, he was the proper party to sue a carrier for violating his right to control the body for the purpose of a decent burial by so mishandling the box in his presence as

23. *N. Y. Merc. Exch. v. B. & O. R. R.*, 36 I. C. C., 156, 160.

24. *United States Express Co. v. Rea*, (Ark. 1915), 181 S. W. 888.

25. *Yazoo & M. V. R. Co. v. Sol-*

*omon*, (Ark. 1916), 184 S. W. 418.

25½. *Pecos v. N. T. Ry. v. Meyer* (Tex. 1913) 155 S. W. 309, 312.

26. *Aultman v. Atlantic Coast Line R. Co.*, (Fla. 1916), 71 So. 283.



to bend down the thumbscrews and burst open the sides of the box.<sup>27</sup> It has been said a suit on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not.<sup>28</sup> So the Carmack Amendment, providing that any common carrier receiving property for transportation from a point in one state to a point in another shall be liable to the "lawful holder" of the bill of lading, authorizes a recovery by the person beneficially interested in the shipment, though he may not be in possession of the bill of lading.<sup>29</sup> And any lawful holder of a bill of lading, issued by the initial carrier pursuant to the Carmack Amendment, upon receiving property for interstate transportation, may maintain an action for any loss, damage, or injury to such property caused by any connecting carrier to whom the goods are delivered.<sup>30</sup> Where plaintiffs pleaded breach of an interstate railroad company's contract to transport, feed, and fatten sheep in transit, and then retransport them to market for sale, and also pleaded wrongful appropriation of the proceeds of the sale to the carrier's use, the fact that the carrier may not have had authority under its filed tariffs to feed and fatten the sheep in transit did not entitle it to judgment on the pleadings.<sup>31</sup>

**C. Pleading.** Various technical objections are often interposed to the pleadings in the case, and thus some very pretty questions of pleading are often decided in loss and damage cases. A shipper sued a carrier for injury to mules thru an unreasonable delay and after the expiration of 91 days filed an amended petition declaring on the same contract, but alleging the cause of delay and the damages with greater particularity than in the original petition. The bill of lading provided that no suit could be amended after 91 days. Held the amended petition did not state a new cause of action and did not come within the limitation of the bill of lading.<sup>32</sup> A provision in an express receipt that

27. *Wall v. St. Louis & S. F. R. Co.*, (Mo. 1916), 182 S. W. 1057, 1058.

28. *J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co.*, (Mo. 1916), 182 S. W. 131.

29. *Norfolk Southern R. Co. v.*

*Norfolk Truckers' Exchange*, (Va. 1916), 88 S. E. 318.

30. *Carr v. Penn. R. Co.*, (N. J. 1916), 96 Atl. 588.

31. *Klink v. Chicago, R. I. & P. Ry. Co.*, 219 Fed. 457.

32. *M. K. & T. Ry. Co. of Tex.*

suits on a claim for loss and damage must be brought within one year, may be relied upon by the defendant at the trial although not specifically pleaded as a defense.<sup>33</sup> A petition for loss and damage did not contain any allegations as to the market value of the stock involved at the point of destination, and the carrier objected to all testimony as to what the market value was at destination, on the ground that there was no allegation to support it. These objections the court overruled. Having alleged generally that the stock was damaged to the extent of \$600, plaintiff below proved what the market value would have been if handled with proper care and delivered in due time and what they were worth in the condition in which they did arrive. Held, what is the proper measure of damages is a rule of law, to be applied by the court, as applicable to the facts given in evidence; that it is not essential to the statement of a good cause of action that the petition should set out a proper legal measure of damages; that a statement of the facts essential to a cause of action is all that good pleading requires, and when there is evidence sufficient to take the case to the jury, it is for the court to inform the jury of the measure of damages.<sup>34</sup> A petition for failure to furnish cars for live stock should not in one count sue in tort and in another count declare on contract.<sup>35</sup> A petition states a cause of action sounding in contract under which it is averred that plaintiff entered into a contract for hire with defendant on the 19th day of August, whereby defendant undertook and agreed to furnish two cars at the shipping point for the reception and shipment of his 59 head of cattle on the morning of August 22d, so as to enable him to deliver them at the National Stockyards, East, St. Louis, on the morning of August 23d. It was averred, too, that plaintiff,

v Neale, (Tex. 1915), 176 S. W. 85.  
 33. Rudolph Wurlitzer Co. v. Barrett, (N. Y. 1915), 154 N. Y. S. 226.

While foreign statutes must be pleaded, it is unnecessary for a defendant carrier to set up in its answer the provisions of the federal laws where the answer showed that the transaction was interstate,

as to which the federal laws govern. Stubblefield v. St. Louis & S. F. R. Co. (Mo. 1916) 184 S. W. 149.

34. Gulf C. & S. F. Ry. Co. v. King, (Texas 1915), 174 S. W. 960, 961.

35. Dalton v. St. L. I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 77, 78.

relying upon the contract so entered into, tendered his cattle to be loaded in cars for shipment on the morning of August 22d, and defendant failed and refused to furnish cars to receive them. Because of this plaintiff was prevented from shipping that day, and in the meantime the market for such cattle materially declined, so as to entail a considerable loss upon him, for which damages were prayed. So much of the petition above adverted to as lays both an agreement on the part of defendant and a consideration therefor, avers a breach of the contract. It is clear the case thus stated and the recovery prayed is one sounding in contract and for its breach. And where a petition contains two counts for negligent delay in furnishing cars, one declaring on contract and the other on tort, the court cannot submit both issues to the jury.<sup>36</sup> Where a petition alleged that corn was good, dry, and merchantable, and that appellants were negligent in "allowing or permitting contents, or part of contents, of said cars to be rained upon or otherwise dampened in transit," an answer that the corn "was shelled while too green, and that same was reshipped in a green, damp, and unripe condition," was nothing more than a denial that the corn was rained upon and was ripe, merchantable grain.<sup>37</sup> Where a shipper sues a carrier for damages to live stock, if the carrier denies transportation and delivery to it of the particular shipment, it cannot afterwards on the trial put in evidence tariffs and classification limiting liability which it has filed with the Interstate Commerce Commission.<sup>38</sup> Where a

36. *Dalton v. St. L. I. M. & S. Ry. Co.* (Mo. 1915), 173 S. W. 77, 79.

By direct provision of Code 1907, §5329, a complaint may contain a count *ex contractu* and one *ex delicto*, provided the actions arise out of the same transaction or relate to the same subject-matter. *Nashville, C. & St. L. Ry. v. Farrell & Braley* (Ala. 1906) 70 So. 986.

The claimant in an action against a carrier for a failure to deliver a shipment may either sue in tort as for a breach of the carrier's com-

mon-law duty to deliver, or for the breach of the contract of transportation. *J. A. Lamy Mfg. Co. v. Missouri Pac. Co.* (Mo. 1916) 182 S. W. 131.

37. *St. L. B. & M. Ry. Co. v. Evans* (Tex. 1915), 173 S. W. 228.

38. *Reading v. C. B. & Q. R. Co.* (Mo. 1915), 173 S. W. 451, 452.

In an action against a common carrier of live stock for damages to a shipment, where, nearly three years after the shipment, and in a second trial, defendant tendered the plea that notice of the loss was

complaint for damages to part of a shipment is sufficiently clear and specific to inform the carriers of the charges of negligence which they are required to meet and to state at law a good cause of action for a breach of common-law duty of the carrier, the refusal of a motion to make a complaint more specific is so far within the discretion of the trial court that a cause will not be reversed on that ground unless the rights of the complaining party have suffered.<sup>39</sup> Foreign freight cars used

not presented within the time required by the contract of shipment, the disallowance of such amendment by the court was proper, defendant having waived the provision of the contract of shipment in view of the lapse of time, the preceding trial, and cost to claimant; that fact that the carrier had been kept from filing such plea before because the United States Supreme Court had not decided that the Carmack Amendment to the Interstate Commerce Act superseded state laws governing a carrier's liability for damage to interstate shipments, affording no reason for inflicting a hardship upon claimant. *Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston* (Ky. 1915) 176 S. W., 1013.

Where a shipper of peanuts contended they were damaged because the car furnished could not be ventilated, allegations, in answer that the shipper was negligent in loading green peanuts into an unventilated car, do not admit that the car was not suitable. *Cleburne Peanut & P. Co. v. Missouri K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1170.

39. *Adams Express Co. v. Welborn*, (Ind. 1915), 108 N. E. 163,

164. Not necessary to name connecting carriers: *Pecos & N. T. Ry. v. Meyer* (Tex. 1913), 155 S. W. 309, 311.

In actions at law where the negligence of the carrier is the basis of recovery, it is not necessary for the declaration to set out the facts constituting such negligence, but an allegation of sufficient acts, causing injury to the claimant coupled with an allegation that such acts were negligently done, will be sufficient. *Aultman v. Atlantic Coast Line R. Co.* (Fla. 1916) 71 So. 283.

The petition in an action against a stockyards company for damages to live stock was not subject to a general demurrer, where it alleged that it was the carrier's duty to notify claimants of the arrival of the stock, and that it neglected to do so, that the stock arrived in a bad condition, and that the carrier negligently placed them in open and unprotected pens, thereby exposing them to the heat of the sun, in direct consequence of which several died, and others were injured, though there was no allegation as to how or in what manner it became the carrier's duty to notify claimants. *Hovencamp v. Union Stock-Yards Co.*, (Tex. 1915), 180 S. W. 225.

by a resident railroad under an agreement to avoid transfer and whereby it uses such freight cars for its own shipments upon the basis of a fixed rental are not subject to attachment by a resident creditor of the foreign carrier, which owns such equipment.<sup>40</sup> Since a trial court has large discretion it may permit by amendment a defense where a suit for damage to freight was not brought in apt time.<sup>41</sup>

A petition, seeking recovery against a carrier for the loss of a valise, averred that it contained enumerated articles of a reasonable value stated, which were for the necessary comfort, convenience, and adornment of claimant and other members of her family who were traveling with her, and so were proper articles of baggage, is sufficient without averring evidentiary facts which would show the articles were proper articles of baggage. *Carter-Mullaly Transfer Co. v. Angell* (Tex. 1915) 181 S. W. 237.

In an action for damage to a shipment of bananas, where the petition described the property as "four cars of bananas loaded in cars M. K. & T.," giving their numbers, such allegation was too indefinite as to the number of bunches or the value, and open to special exception. *Illinois Cent. R. Co. v. Freeman* (Tex. 1916) 182 S. W. 369.

In an action by shippers of live stock for delay in transit, where the petition alleged only that the cattle should have arrived on a certain date, but did not, whereby the shippers were compelled to hold them over for the next market, proof of an additional shrinkage in weight after arrival and of

the decline in the market at which the cattle were sold was inadmissible for want of basis in the pleadings. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

In an action by shippers of live stock for delay in transit, the petition, alleging that the cattle should have reached destination on a given date, but did not, so that claimants were compelled to hold them over for the next market, was insufficient as failing to allege when they arrived and why they were held over. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

A declaration which in substance alleges that although the goods which were delivered to a carrier for transportation were destroyed by an act of God, yet the carrier could have foreseen and diligence could have protected the goods from injury, but that it negligently failed to do so, states a cause of action against the carrier. *Gulf Coast Transp. Co. v. Howell*, (Fla. 1915), 70 So. 567.

40. *Koontz v. Baltimore & O. R. Co.* (Mass. 1915), 107 N. W. 973.

41. *Kansas City Southern Ry. Co. v. Bull*, (Ark. 1915), 179 S. W. 172, 174.

—Counterclaims. An interesting question of pleading peculiar to loss and damage cases is presented in the problem as to the right of a shipper to file a counterclaim for damages to a shipment when sued for the freight charges. It has sometimes happened that when goods have been delivered in a damaged condition, the shipper, if he has obtained possession of them without payment of the freight charges, because he was on the carrier's credit list, or for some other reason, refuses to pay the charges when asked to do so, but seeks to set-off his damage when sued. For instance, in a recent case in Indiana a shipper was sued for \$328.13 freight charges, and obtained a verdict for \$1066.80 on a counterclaim for injuries to the shipment.<sup>42</sup>

The United States courts, however, have had occasion recently to pass upon this question in two cases, and these District Courts have held that a claim for loss and damage, growing out of a freight shipment, does not constitute a lawful offset against a claim of an interstate carrier for unpaid freight charges. These federal decisions hold that it is against public policy to permit a counterclaim of this kind to be filed. The theory of such federal decisions is that it opens the door for fictitious claims. The idea seems to be that since one of the devices used in the obtaining of

42. N. C. & St. L. Ry. v. Johnson (Ind. 1915) 109 N. E. 912.

As a matter of general law, in an action of a common carrier for charges, the shipper may set off damages to or loss of goods sustained by the negligence of the carrier.

Schwinger v. Raymond, 83 N. Y. 192.

Dunham v. Bower, 77 N. Y., 76.  
Manning v. Watson, Cheves (S. C.), 60.

S. & N. Ala. R. R. Co. v. Heinlein & Barr, 56 Ala., 368.

Bearse v. Ropes, Fed. Case 1192  
Leech v. Baldwin, 5 Watt's, 446.  
Snow v. Carruth, Fed. Case 13144.

Relyea v. New Haven Rolling Mill Co., 42 Conn., 579.

Edwards v. Todd, 2 Ill., 463.

Bancroft v. Peters, 4 Mich., 619.  
Mallory v. Burrett, 1 E. D. Smith, N. Y., 234.

Rhodes v. Newball, 126 N. Y., 574.

But see Merrick v. Gordon, 20 N. Y., 93.

Byrn v. Weeks, 4 Abb. Ct. of App. Dec., 657.

Star Bird v. Barrons, 43 N. Y. 200.

Elwell v. Skiddy, 8 Hun., 72; 77 N. Y., 282.

Battle v. Atkinson, (Ga. 1911); 71 S. E., 775.

rebates is the making of fictitious claims for damages, to permit counterclaims in actions of freight charges would simply open the door to a renewal of this method of rebating, and at least would cast a suspicion upon the transaction if a compromise is effected. As one of the courts expressed it: "So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded \* \* \*."<sup>42½</sup> The soundness of these federal decisions, however, being as they are in trial courts, may well be doubted. The federal courts of the different states conform their practice as near as may be to the practice in the state courts in which their respective districts are located. If, under the state practice, a counterclaim of this kind is permissible, there is no reason why a federal court should presume a carrier and shipper intend to evade the law by fictitious suits. If the shipper has a valid claim it is certainly easier to adjudicate it in a suit growing out of freight charges on the same shipment than to have two separate suits brought. Of course, as a matter of good practice, as well as law, there is no reason why a shipper should be permitted to counterclaim damages for loss or injury to a different shipment than that for which he is sued for charges, but where it is all one transaction, it can hardly be said to be against public policy to allow a counterclaim to be filed. Certainly it is difficult to believe that the shipper and carrier who seek to evade the law by paying fictitious claims will do so in open court in the shape of the compromise of a lawsuit, when there is very much less risk attached to paying a fictitious claim direct without the publicity attending court action.

**D. Burden of Proof.** The question of what proof the claimant must make is one of extreme importance. Since the facts of how the injury occurred, are generally within the exclusive knowledge of the carrier, the courts are liberal in permitting the claimant, by showing certain essential facts within his knowledge to raise presumptions which complete his case. Thus if he shows

<sup>42½</sup>. Ill. Cent. R. R. v. Hoopes Ry. v. Stein, 233 Fed.—; also see and Sons, 233 Fed. 135; C. & N. W. I. C. C. Conference Ruling 48.

property is delivered to the carrier in good condition, and arrives at destination in damaged condition, a prima facie case of negligence of the carrier is made out.<sup>43</sup> A shipper showing a delivery of goods to a carrier, and that they were not redelivered makes out a prima facie case against the carrier entitling him to damage for his loss, and to avoid such damages the burden is upon the carrier to prove its freedom from liability.<sup>44</sup> Where a shipper shows a delivery of goods to a carrier as warehouseman, and a failure to redeliver, he makes a prima facie case entitling him to damages, and the burden is then on the warehouseman to explain the loss in a manner not attributable to his negligence.<sup>45</sup> And where a shipper expressly alleged that the goods were in good condition when delivered to the carrier, he has the burden of proving that fact.<sup>46</sup> So if it is shown that cattle are delivered in good condition to a carrier and they reach destination injured, and delay in transportation is shown on the part of the railroad, then it devolves upon the carrier to show an excuse therefor.<sup>47</sup> All that a shipper of live stock which has been delayed

43. *Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co.*, (Minn. 1915) 153 N. W. 115.

The receipt of goods in a damaged condition raises a presumption that the carrier was negligent. *St. Louis I. M. & S. R. Co. v. Hudgins Produce Co.*, (Ark 1915) 177 S. W., 400; *C. R. I. & G. Ry. v. Scott* (Tex. 1912), 156 S. W. 294, 297.

A cast iron heating boiler shipped from St. Paul to Waseca by train, transferred from the train by dray and lowered into a basement, and there installed, was found, after installation, to be cracked. The evidence was that it was sound when shipped, and that it was carefully handled after it was taken from the train, and received no jars or jolts, but there was evidence that such boilers crack very easily, and there was

no positive evidence that it was not cracked while so handled. The evidence was not conclusive that the damage occurred while on the train, and it was held the rule that, when goods are delivered to a carrier in good condition and arrive at destination in damaged condition a prima facie case of liability is made out, did not, as a matter of law, apply. *Lewer v. Minneapolis, & St. L. R. Co.* (Minn. 1916) 156 N. W. 6.

44. *Chicago, R. I. & P. Ry. Co. v. Stouffer*, (Ind. 1916), 111 N. E. 809.

45. *Chicago, R. I. & P. Ry. Co. v. Stouffer*, (Ind. 1916), 111 N. E. 809.

46. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1070.

47. *Rogers v. T. & P. Ry. Co.*, (Tex. 1914), 172 S. W. 1117, 1119.



in transit is required to prove, is the delay which causes the injury to the cattle. If there is an unreasonable delay, and there is a cause for it which would in law excuse, the facts are peculiarly within the knowledge of the carrier and its agents, and the rule is that it is incumbent upon the carrier to plead and prove it.<sup>48</sup> So where it appears that when potatoes were delivered to the carrier they were matured, ripe, and in sound order, and when the same were delivered to the consignee they were in a damaged condition, a prima facie case of liability is made out against the carrier even though the potatoes were shipped in refrigerator cars, and the burden is upon the carrier to show that the damaged condition of the potatoes was due to no fault or negligence on its part, or that the damage was due to the inherent nature of the potatoes themselves.<sup>49</sup> So where onions in

48. *T. & P. Ry. v. Martin Bros.* (Tex. 1915), 175 S. W., 707, 708.

In suit for loss of or injury to bailed goods, where a failure or refusal of the bailee to return the property on demand is shown, the burden rests upon him to make satisfactory explanation. *Perry v. Seaboard Air Line R. Co.* (N. C. 1916) 88 S. E. 156, 157.

In an action for damages to a shipment of cotton seed, where a witness testified that he had no express recollection about the particular car of cotton seed, but that he handled all the seed shipped from a gin, and that all shipments were in good condition when shipped out, there was sufficient evidence that the shipment was in good condition when delivered to the initial carrier to sustain a verdict for the shipper. *St. Louis, I. M. & S. Ry. Co. v. Home Oil & Mfg. Co.* (Ark. 1916) 183 S. W. 176.

In an action by the shippers of live stock, where the complaint alleged the carrier agreed that the

stock should not be unloaded in Nashville, Tenn., which agreement the road failed to keep, so that the stock were exposed to pleural pneumonia, and part of them contracted the disease and died, in order for the shippers to recover, it was incumbent upon them to prove that the contract contained the stipulation alleged regarding unloading. *Nashville, C. & St. L. Ry. v. Farrell & Braley* (Ala. 1916) 70 So. 986.

A vague estimate as to damage to a shipment, based on a witness' examination of 12 to 15 packages out of 327 at the time of receipt, and the amount for which he sold them 30 or 60 days thereafter, held insufficient to warrant submission to the jury of the amount of damage to the shipment. *Perkett v. Manistee & N. E. R. Co.*, (Mich. 1916), 157 N. E. 388.

49. *D. & R. G. R. Co. v. A. Peterson Grocery Co.*, (Colo. 1915) 147 Pac. 663, 664.

good condition when shipped, and in a commercial sense perishable, were kept in a closed car nearly 14 days after arrival before notice to the claimant, during which owing to climatic conditions they sprouted and decayed, the jury could find that the resulting loss was caused by the carrier's negligence.<sup>50</sup>

The well-settled rule is that, where a shipment of live stock is accompanied by the owner or his agent, and injury results during transit, the burden is upon the owner to show how the injury occurred—i. e., whether it was caused by some actionable negligence upon the part of the carrier; but, where the live stock is not accompanied by the owner or his agent, and injury results during transit, then, when the owner shows that the live stock was in good condition when delivered to, and accepted by, the carrier for shipment, and was in a damaged or injured condition when delivered by the carrier to the consignee at the place of destination, the burden shifts; and, unless the carrier can show that the injury was due to the inherent nature, propensities or viciousness of the animals, the fact of injury is taken as *prima facie* evidence of actionable negligence upon the part of the carrier in the transportation thereof.<sup>51</sup> Under this rule, where a claimant did not accompany the shipment, it was sufficient for him to allege and prove the delivery to, and acceptance by the carrier of the live stock in good condition, and

50. *Garvan v. N. Y. C. & H. R. R. R.*, 210 Mass. 275, 96 N. E. 717; *Hudson v. Baxendale*, 2 H. & N. 518; *St. Clair v. Chicago, Burlington & Quincy R. R.*, 80 Iowa, 304, 45 N. W. 570; *South Deerfield Onion S. Co. v. New York, N. H. & H. R. Co.*, (Mass. 1916), 111 N. E. 367, 369.

51. *I. C. R. R. Co. v. Word*, 149 Ky. 229; *McC Campbell, etc. v. L. & N. R. Co.*, 150 Ky. 723; 150 S. W. 987; *L. & N. R. Co. v. McClintock*, 151, Ky. 455, 152, S. W. 253; *I. C. R. R. Co. v. Howard*, 152 Ky. 308, 153 S. W.

427; *L. & N. R. Co. v. Cecil*, 155 Ky. 170, 159 S. W. 987.

A shipper, accompanying a shipment of live stock, has the burden of proving that injury to the stock was occasioned by the carrier's negligence. *Kolkmeyer v. Chicago & A. R. Co.* (Mo. 1916) 182 S. W. 794.

A charge in an action for injuries to a shipment of goods, that the burden of proof was on claimant to make out a case is not objectionable, on the theory that when a shipment is delivered in good condition, but arrives damaged, the

that the carrier failed to deliver the same at destination in like condition. It then devolves upon the carrier to show that the injuries were due to the act of God or the public enemy, or to the inherent nature and qualities of the live stock, or to the act or fault of the shipper himself. Unless the carrier can show this, it is liable for loss or injury regardless of whether it was negligent or not. It was, therefore, surplusage for the plaintiff to allege in his petition any negligence upon the part of carrier.<sup>52</sup>

The burden does not rest upon the shipper to show just exactly at what part of the transit an injury to his shipment

burden is on the carrier to excuse the injury, the proof not showing without contradiction that the shipment was in good condition when received, and claimant having alleged that it was delivered in good condition, for if the burden on that issue had shifted, such contention should have been presented by an appropriate request. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1916) 184 S. W. 1070.

52. *L. H. & St. L. R. Co. v. S. S. H. & C. Co.*, 157 Ky. 772, 164 S. W. 90, C. N. O. & T. P. Ry. Co. v. Veatch (Ky. 1915), 172 S. W. 89, 90.

Proof that out of a shipment of cattle, which were in good condition when they started, one was dead on arrival and another so injured that it died before the animals could be sold, will not without more proof that the dead steer died from injuries of some kind establish negligence on the part of the carrier. *Illinois Cent. R. Co. v. Peel*, (Miss. 1916), 70 So. 887.

Where cattle were in good condition when delivered to the carrier, and when received some of

the animals were dead and others injured, the carrier has the burden of showing that the injuries were not caused by its negligence, and to escape liability must account for its handling of the cattle during all the time they were in its charge. *Yazoo & M. V. R. Co. v. Bell* (Miss. 1916) 71 So. 272.

In an action for damages for the death of hogs shipped on a very warm March day, evidence that out of the shipment, which for a long time stood on a siding, 13 of the hogs died, coupled with proof that the loss was greatly above the normal loss, warrants a finding of the carrier's negligence. *Botts v. St. Louis & H. Ry. Co.* (Mo. 1915) 177 S. W. 746.

While, owing to the limitations on its liability, negligence of a carrier of live stock must be shown, it may be established by circumstantial evidence. *Botts v. St. Louis & H. Ry. Co.* (Mo. 1915) 177 S. W. 746.

Where, in an action against a carrier for injuries to live stock, the court required the jury, in order to find for the shipper, to find that

occurred.<sup>53</sup> But in an action against a connecting carrier for injury to live stock through delay and rough handling it is competent for the shipper to prove the appearance and condition of the cattle at the shipping point and at the destination without first showing their condition at the junction point where the connecting carrier received them, if the court charged the jury that the connecting carrier was only responsible for damages occasioned by its own negligence.<sup>54</sup> In an action for injuries to live stock the carrier claimed exemption because there was no evidence tending to show what the condition of the cattle would have been upon their arrival at the place of destination, if they had been transported and delivered with ordinary care and diligence. According to testimony of claimant's witnesses, the cattle were in good condition when they were loaded on the cars, and the proof was uncontroverted that, when they reached their destination, 11 of them were dead, being piled upon each other, and many

the stock was properly loaded, and that the carrier negligently injured it, and that, if injury happened by reason of neglect of the shipper's servant accompanying the stock, there could be no recovery, a charge erroneously imposing on the carrier the burden of showing that the injury was not caused by its negligence in handling the car was not prejudicial to the carrier. *Kolkmeier v. Chicago & A. R. Co.* (Mo. 1916), 182 S. W. 794.

Where it was shown that horses were delivered to a railroad company, in good order, and at the end of the transit were found to be injured, the burden rests upon the road to rebut the presumption of its negligence. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.* (N. C. 1916) 88 S. E. 476.

Where it was shown that horses received severe bruises and other injuries during a shipment, and

were weak and hungry on arrival at their destination, the failure of proof as to the precise place or manner in which the injuries were received does not defeat the shipper's right to recover. *Southern Pac. Co. v. W. T. Meadors & Co.* (Tex. 1915) 176 S. W., 882.

In an action for injuries to a shipment of horses, where plaintiff did not accompany the shipment, nor did any one for him, who was authorized to do more than to try to keep the horses up, the burden is on the carrier to explain the cause of the injuries received by the horses. *Southern Pac. Co. v. W. T. Meadors & Co.* (Tex. 1915) 176 S. W., 882.

53. *St. Louis I. M. & S. Ry. Co. v. Nunley*, (Ark. 1915), 179 S. W. 369.

54. *Houston & T. C. R. Co. v. Lindsey*, (Tex. 1915), 175 S. W. 709.

of the rest bruised, skinned, and in a very bad condition generally. It was also shown that no one accompanied the shipment for the claimant. Held, under such circumstances a prima facie case of negligence was made by the claimant, and if any of the injuries sustained by the cattle were due to inherent vices of the animals, the burden was upon the carrier to show that fact.<sup>55</sup> Where a carrier persists in demanding from a shipper an excessive amount of freight charges, no formal demand and tender of the freight is necessary to support an action for conversion.<sup>55½</sup>

The burden of proof rests upon the bank which sues an express company for the loss of part of the contents of a package of money to show the amount in the package when shipped and the amount when delivered to the consignee.<sup>56</sup> And the fact that the bill of lading recites that goods are received in apparent good order does not relieve the shipper of a carload shipment of household goods from the burden of proof of showing that he properly and safely loaded them.<sup>57</sup> But the burden of proof is upon an interstate carrier who has negligently lost property in transit, claiming a release to the amount of the shipper's declared or agreed value of such property, to prove all the facts essential to such defense, including a valid stipulation of release.<sup>58</sup> In an important case recently decided, damages were claimed because the carrier mixed infected cattle among sound cattle in the pens, communicating to them the disease. Upon reviewing the evidence the court held if the railroad brought cattle from infected territory, or cattle bearing ticks that produced disease among a shipper's cattle, from which they died, it would of

55. See *F. W. & D. C. Ry. Co. v. Greathouse*, 82 Tex. 111, 17 S. W. 834, St. L. & S. F. Ry. Co. v. Brosius, 47 Tex. Civ. App. 647, 105 S. W. 1131. *Kansas City M. & O. Ry. Co. v. Cave*, (Texas 1915), 174 S. W. 872, 873.

55½. *A. T. & S. F. Ry. Co. v. Etherton*, (Okla. 1915), 145 Pac. 779.

56. *Adams Express Co. v. National Bank of Middlesboro* (Ky. 1915), 172 S. W. 660.

57. *Best v. G. N. Ry.*, (Wis. 1915), 150 N. W. 484, 486.

58. *St. L. & S. F. R. Co.*, (Okla.), 144 Pac. 1036, 1037.

Burden on carrier to show validity of bill of lading; *Norfolk & W. Ry. v. Steele & Son* (Va. 1915), 86 S. E. 124.

course, be liable for the damage; but the mere fact that fever developed among cattle at a certain point after a car of cattle was unloaded, with further testimony that for some time prior thereto there had been no infection nor fever among the cattle in and around the place, was not sufficient to show that said cattle were infected, or from infected territory, and communicated the disease to the cattle of claimant; especially where the station is within a short distance of the district cattle quarantine line, and it is equally as probable that the disease from which the cattle died could have been communicated by cattle or ticks coming from below the quarantine line, which was hard by the station.<sup>59</sup> So, in an action for negligently dipping cattle in an unclean manner it was held the fact that the cattle included in the shipment and subjected to the dip, as alleged in plaintiff's petition, fattened during the winter and sold thereafter at as good a price as other cattle not included in the shipment, or not subjected to the dip, would not preclude a recovery by plaintiff, if, in fact, the cattle were in reality depreciated in value by reason of the dip, and if the carrier was guilty of negligence in the manner of giving or preparing for said dip.<sup>60</sup> The presumption that goods delivered to the initial carrier as in good order were received in the same condition by the last of several connecting carriers is not a conclusive presumption, but may be rebutted by proof that the damage to the shipment was due to the inherent character and qualities of the article or goods shipped. Presumptions arising by law are substitutes for evidence, and, in the absence of an appropriate request for instructions, the court is no more required to call particular attention to specific facts resting upon presumption than to facts established by direct evidence.<sup>61</sup> It is said it is a salutary rule, where the property carried is committed exclusively to the custody of the carrier, that the burden is on the carrier to allege and prove

59. *St. L. I. M. & S. Ry. Co. v. S. W.* 880, 882.

*Campbell* (Ark. 1915), 172 S. W. 823, 825.

60. *Missouri K. & T. Ry. Co. of Texas v. Cauble* (Texas 1915), 174

61. *Capital City Oil Co. v. Central of Georgia Ry. Co.* (Ga. 1915), 86 S. E. 57.

the existence of any exception to its liability as a common carrier.<sup>62</sup>

**E. Competency of Witnesses.** Questions concerning the right of various witnesses to testify often arise. It has been held the wife of the plaintiff can testify concerning the value of household goods.<sup>63</sup> In an action for the loss of freight the freight claim agent of the carrier can testify as to the efforts he made in tracing same and as to its sale as unclaimed freight, and the disposition of the proceeds, where he had personal knowledge of such facts.<sup>64</sup> In an action for loss and damage to a shipment of cattle, it is proper to ask an expert live-stock shipper whether a load of 62 head of cattle, weighing in the neighborhood of 22,000 pounds would overcrowd the car where such person had testified that he had frequently shipped from 22,000 to 28,000 pounds in a car

62. *Chicago, etc. Co. v. Slaterry*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825; *South, etc., Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Cooper v. Raleigh, etc., Co.*, 110 Ga. 659, 36 S. E. 240; *McCoy v. Keokuk, etc., Co.*, 44 Iowa, 424; 5 Thompson on Negligence, sec. 6454; *Stiles v. Louisville, etc., Co.*, supra, note 18 L. R. A. (N. S.) page 93. *Nashville, C. & St. L. Ry. Co. v. Johnson*, (Ind. 1915), 109 N. E. 912, 916.

63. *St. L. I. M. & S. Ry. v. Wallace* (Tex. 1915), 176 S. W. 764, 767.

In an action against a carrier for conversion, a witness' testimony that she could enumerate the various articles which were packed or prepared with her assistance, and that she was present and helped pack and load the wagons with the goods that were shipped, and that she testified from what she did and

saw herself shows that she was fully qualified to testify to the identity of the property. *Pecos & N. T. Ry. Co. v. Porter* (Tex. 1916) 183 S. W. 98, 99.

64. *St. L. I. M. & S. Ry. v. Wallace*, (Tex. 1915), 176 S. W. 764, 766.

Error was committed by the trial judge in refusing to permit further cross-examination, under chapter 4 of the Laws of 1907, of one who was claimed to be a managing agent of a railway company, on the ground that the court could not see that the claimant could show such person to be a managing agent, after such witness had testified that he had been in the employ of the carrier company for 21 years, that during such time he had been operator, station agent, trainmaster, live stock agent, freight transfer agent, assistant superintendent, and general agent; that at the time of the trial he was general agent of the company, and as such general agent had charge of the business of

without overcrowding.<sup>65</sup> In a case involving injury to live stock the shipper introduced evidence tending to show that the car was overcrowded and that this occasioned injury to part or all of the cattle. On rebuttal the carrier called witnesses who testified that they were familiar with cars such as that conveying the cattle, and that 62 head of cattle such as those hauled might be placed in a car without overcrowding. An objection was made that this was not proper expert testimony, and not based on facts disclosed. Held, the testimony related to matters not familiar to the ordinary juror and hence was competent.<sup>66</sup> A shipper cannot testify, in his opinion, what is a reasonable time to make a run, since what is a reasonable time to make a railroad trip is a question of mixed law and fact for the jury to decide.<sup>67</sup> Witnesses who have had several years experience in the cattle business and are familiar with the effect upon cattle dipped in arsenic and in crude oil are sufficiently qualified as experts to testify to the injury caused to cattle by dipping in crude oil.<sup>68</sup> There is no error in permitting a witness to testify as to the market value of horses in the condition they arrived and what it would have been if they had been delivered in the time and manner they should have been.<sup>69</sup> But a shipper should not testify as to what is his opinion of the difference in value between a shipment when it arrived and its value had it arrived within a reasonable time. His testimony should be as to what is the actual difference.<sup>70</sup> But a witness testifying as to market value, must be qualified on the subject. Where in a suit for damages to a shipment of live stock, a witness for claimant had testified that

soliciting freight up and down the line of the company and solicited the freight from the claimant during the times covered by the suit; and, also, that he had taken part in trying to get a settlement for the claimant. *Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co.*, (N. D. 1916) 156 N. W. 1019.

65. *Golsch v. Chicago M. & St. P. Ry. Co.* (Iowa 1915), 153 N. W. 327, 329.

66. *Golsch v. Chicago, M. & St. P. Ry. Co.*, (Iowa 1915), 153 N. W. 327, 329.

67. *Gulf C. & S. F. Ry. Co. v. Bogy* (Texas 1915) 178 S. W. 577, 578.

68. *Missouri K. & T. Ry. Co. of Texas v. Cauble*, (Texas 1915), 174 S. W. 880, 882.

69. *Gulf C. & S. F. Co. v. King*, (Texas 1915), 174 S. W. 960, 961.



he did not know the market value of such cattle at destination, his estimate that, if the cattle had reached destination in good condition, they would have been worth on the market from \$1.50 to \$2.50 a head more than in the condition when they arrived, was a mere guess and inadmissible.<sup>71</sup> In an action for damage to a shipment of bananas, one saying he was a practicing physician was improperly allowed, over defendant's objection, to testify as to the market value of bananas by the hundred pounds at the point of shipment, where he had previously stated he could not say he had ever seen the bananas in controversy, did not know how many bunches were in a car, and did not know their grade.<sup>72</sup> But where a witness testifies that during a certain season he was engaged in shipping fruit to certain markets, and daily received telegrams and advices from different dealers in that commodity concerning the value of the fruit, and also received information by sale bills and wires, and, based on that information, he knew what the market price was on that date, such evidence was competent.<sup>73</sup> In an action for delay and injury to a shipment of live stock, a witness engaged in the wholesale buying and selling of horses and mules, who had made shipments to destination, and who testified that the market to which he shipped was practically the same as at other places in that section of the country, was properly qualified to testify that the market value of the shipment was greater at destination than at the point of origin of the shipment.<sup>74</sup>

A shipper can testify as to the usual and customary time it takes to transport a shipment between given points. A reasonable time for the shipment is so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In determining what is a reasonable time or an unreasonable time, regard is to

70. *Gulf, C. & S. F. Ry. Co. v. Bogy*, (Texas 1915), 178 S. W. 577, 578.

71. *St. Louis Southwestern Ry. Co. of Texas v. Kerr*, (Tex. 1916), 184 S. W. 1058.

72. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

73. *Louisville & N. R. Co. v. McHan*, (Ga. 1916), 87 S. E. 889, 890.

74. *Texas & P. Ry. Co. v. De Long*, (Tex. 1915), 176 S. W. 874.

be had to the facts of the particular case. A reasonable time, when no time is specified, is a question of law and fact for the jury to decide under proper instructions.<sup>75</sup> A witness who qualifies as an expert concerning the condition of shipments of vegetables is competent to testify that a car containing perishable produce has been roughly handled, in that he found most of the freight smashed and lying on the floor of the car and that any man of average intelligence would know that nothing but rough handling could have produced such results.<sup>76</sup> The testimony of an experienced stockman as to what extra shrinkage a specified delay in transportation would produce on cattle is admissible.<sup>77</sup> The testimony of men who have been engaged for many years in the buying and selling and handling of live stock, and the shipment thereof, as to the effect upon cattle of delays in shipment, is not mere speculation and guess work, but its reliability depends largely on the experience and fairness of such witnesses, though of course their judgment as to the extent of shrinkage or depreciation is not reducible to anything like a mathematical certainty.<sup>78</sup> But the competency of a witness to testify as to the shrinkage of cattle is primarily a question for the trial judge to determine. Unless his decision is manifestly erroneous, it cannot be disturbed on ap-

75. *Gulf C. & S. F. Ry. Co. v. Bogy* (Texas 1915) 178 S. W. 577, 579.

76. *San Antonio & A. P. Ry. Co. v. Bracht* (Tex. 1915), 172 S. W. 1116.

One having an experience of 15 or 20 years of shipping live stock, may testify that it is usual and customary to bed cars with sand or hay to enable stock to stand. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Tex. 1915) 177 S. W. 525.

In an action for injuries to live stock in shipment, testimony by the shipper as to the ordinary shrinkage of cattle under proper shipment, if they were properly hand-

ed, is not an opinion on a mixed question of law and fact, since the expressions "proper shipment" and "properly handled" do not refer to the condition of the cattle under the shipment in question, but to the usual and ordinary shrinkage of cattle of that class when shipped. *Chicago R. I. & G. R. Co. v. Gore*, (Tex. 1915) 176 S. W. 778.

77. *T. & P. Ry. Co. v. Martin Bros.*, (Tex. 1915), 175 S. W. 707, 708.

78. *G. C. & S. Ry. Co. v. J. A. Bowers & Son*, (Tex. 1915), 175 S. W., 861, 862.

peal.<sup>79</sup> A shipper of cattle with considerable experience can testify that pens in which the cattle have been unloaded and confined en route were too small, where such witness before expressing his opinion detailed the facts as to the sufficiency of the pens; since a non-expert witness is allowed to express his opinion, when in so doing he at the same time details the facts and circumstances upon which same is based.<sup>80</sup> A shipper of cattle can testify that they were in worse condition when they reached destination than they would have been had they been transported in the usual and ordinary way, where such shipper had considerable experience in shipping cattle and had made many shipments between the points involved.<sup>81</sup> In an action against an express company for injuries to a colt from being left over night in a barn having a defective floor, the testimony of expert witnesses that, in their opinion, the barn was unsafe, was properly admitted, where the opinions were based on conditions which witnesses saw and afterwards described to the jury.<sup>82</sup> In an action for loss and damage to frozen potatoes, the testimony of the shipper that the potatoes were worth \$1.35 per bushel when purchased and the market value was \$1.35 per bushel and that the frozen potatoes were absolutely worthless,

79. *T. & P. Ry. Co. v. Martin Bros.*, (Tex. 1915), 175 S. W., 707, 708.

In a suit for injuries to cattle in shipment, a witness, though an expert, cannot state his conclusion as to the depreciation which the cattle would have suffered by ordinary shipment and the depreciation they suffered as it was; the question of depreciation being for the jury's determination, and the witness assuming it. *Pecos & N. T. Ry. Co. v. Holmes* (Tex. 1915) 177 S. W. 505.

Claimant, who had shipped hogs a number of times, may testify as to the normal shrinkage of hogs resulting from shipment. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361.

In an action by shippers of live

stock for delay in transit, where the petition alleged only that the cattle should have arrived on a certain date, but did not, whereby the shippers were compelled to hold them over for the next market, proof of an additional shrinkage in weight after arrival and of the decline in the market at which the cattle were sold was inadmissible for want of basis in the pleadings. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

80. *Houston & T. C. R. Co. v. Lindsey* (Tex. 1915), 175 S. W., 708, 709, 710.

81. *Houston & T. C. R. Co. v. Lindsey*, (Tex. 1915), 175 S. W., 709.

82. *U. S. Horseshoe Co. v.*

is sufficient to support a judgment, although it does not specifically state that the value referred to was the value at destination.<sup>83</sup> Where cattle were delivered in different cars from those in which they were shipped, the evidence shows conclusively they had been unloaded en route.<sup>84</sup> Although it appears that cattle are weak when shipped, still if there is evidence to show that they were not too weak and poor to ship and that there was a delay of two days and rough handling, a judgment of damages for death will not be reversed on appeal.<sup>85</sup> In an action for delay one of the principal grounds of defense relied upon was that delay complained of was unavoidable, and due to destruction (by fire for which carrier was not responsible) of a bridge on a line of connecting carriers. The shipper introduced evidence that another shipment made at the same time from the same place, arrived a day earlier. Held, the mere fact that this so-called "parallel shipment" was made on a different train from that on which the plaintiffs' stock was shipped does not in itself make the evidence inadmissible. The proximity in point of time, and the identity of the route and termini, bring the evidence clearly within the general principles set out in *Riverside, etc., Cotton Mills v. Waugh*, 117 Va.—, 84 S. E. 658, as to the admissibility in evidence of collateral events and occurrences which are similar to those forming the subject of the controversy.<sup>86</sup>

**F. Admissibility of Evidence.** The general rules of law govern the admission of evidence in loss and damage cases. In other words, there are no special rules of evidence applicable particularly to this kind of litigation, which distinguishes it from any other. Certain presumptions help out the plaintiff, and the In-

*American Express Co.*, 95 Atl. 706.

83. *G. H. & S. A. Ry. v. Brown*, (Tex. 1915), 175 S. W., 749.

84. *G. C. & S. F. Ry. Co. v. J. A. Bowers & Son*, (Tex. 1915), 175 S. W., 861.

85. *International & G. N. Ry. Co. v. Frank*, (Tex. 1915), 177 S. W. 168.

86. *Norfolk & W. Ry. Co. v. A.*

*J. Steele & Son*, (Virginia 1915), 86 S. E. 124, 127. See also, *Mich. Cent. R. Co. v. Curtis*, 80 Ill. 324, in which it was held that the loss of a depot was not sufficient excuse for delay when it appeared that subsequent shipments over the same road reached their destination in advance of the shipment involved in the suit.

terstate Commerce Act to some extent defines the possible procedure as well as certain substantive rights, but the admission of testimony is governed by the common law and the state statutes. Each objection to testimony therefore presents an instance to be judged under the general law with reference to the particular situation in which it arises. Specific instances, therefore, as affected by the general rules, afford the best guide in determining whether certain evidence is admissible in loss and damage cases. Questions of evidence, and of the admissibility of the various kinds of evidence in particular cases are, however, so interwoven with every part of the subject of loss and damage that they are in most cases best considered in connection with the particular branches of the subject to which they relate. It remains only to here consider certain holdings as to the admissibility of evidence of a more general nature. For instance, in an action for injuries to household goods it has been held that evidence is admissible to show that such goods had been shipped uncrated for long distances without injury.<sup>87</sup>

A conversation between a shipper of live stock and the local agent of the initial carrier with respect to the market a shipper desires a shipment of live stock to reach, made just before the cattle were received by the company, is admissible.<sup>88</sup>

If a certain treatment of cattle depreciates them in flesh or makes them sick, and consequently additional care and expense is required in the subsequent handling of said cattle, and additional feed required because of such treatment, such a fact is

In an action by shippers of live stock for delay in transit, testimony of a claimant, on cross-examination as to his testimony in another action, tending to show that it would take a longer time to make a shipment of cattle from the shipping point to destination than was testified to by him, was admissible. *International & G. N. Ry. Co. v. Landa & Storey*, (Tex. 1916) 183 S. W. 384, 385.

In an action for injuries to a

shipment of peanuts, testimony that the peanuts, if in proper condition when shipped, would keep for a longer time than that of the shipment, given by experienced dealers, though not of the locality, is admissible. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. 1916) 184 S. W. 1070.

<sup>87.</sup> *Best v. G. N. Ry.*, (Wis. 1915), 150 N. W. 484, 486.

<sup>88.</sup> *Texas & P. Ry. Co. v. White* (Texas 1915) 174 S. W. 953, 955.

admissible as probative of the main fact sought to be proved, to wit, the depreciation in market value of the cattle in controversy by reason of such treatment. Because the evidence elicited does not go to the full measure of the test provided by law is no reason why it should be held inadmissible. It may tend to establish such measure of damages, though not in itself establishing it.<sup>89</sup>

The admissibility of public documents in cases of this nature has also been passed upon. Thus error was charged in refusing to allow a carrier to introduce in evidence a United States government report of tests made of the shrinkage of other cattle under certain circumstances, issued in the form of a printed bulletin. The principle, as gathered from the authorities, is that wherever documents of a public nature would themselves be evidence if produced, and which could not, without inconvenience to the public interest, be removed from their place of custody, certified copies or copies verified by some person who has seen the original are admissible.<sup>90</sup> Therefore, in this case, the evidence sought to be introduced being in the nature of experiments, the party seeking to introduce it must also show that the material facts prove similar conditions existed. And there being no evidence that the pamphlets were authentic, nor that the conditions and facts under which the experiments were made were similar, the bulletins were not admissible.<sup>91</sup> In an action for damages by delay it was

89. *Missouri K. & T. Ry. Co. of Texas v. Cauble*, (Texas 1915), 174 S. W. 880, 881; *United States Express Co. v. Rea* (Ark. 1915) 181 S. W. 888.

The price at which a shipment is sold f. o. b. point of origin is sufficient evidence of its value under section 3 of the uniform bill of lading provided that the damages should be computed on the difference between the market price of goods at the time and place when and where they should have been delivered and their value when and in the condition in which they

were delivered. *St. Louis I. M. & S. R. Co. v. Laser Grain Co.*, (Ark. 1915), 179 S. W. 189.

90. *Smither v. Lawrence*, 100 Tex. 77, 93 S. W. 1064.

91. *T. & P. Ry. v. Graham & Price* (Tex. 1915), 174 S. W., 297 298.

In an action for damages for negligent transportation of stock, it is not error to exclude tables of the Department of Agriculture and by the Texas Cattle Raisers' Association as to tests of shrinkage of stock in transportation, where there is nothing to show that they

contended that the court erred in permitting the manager of the shipper to testify to the market price of peaches in Boston at the time the three cars in question should have been delivered there, from his knowledge based upon market reports and quotations not produced in evidence. This witness stated that he kept informed of the market price of peaches in Boston during the time the shipment should have arrived from the market quotations published in the newspapers and otherwise, and that such value was as stated by him.<sup>92</sup> It was held that standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, were admissible as evidence of market values of articles of trade.<sup>92½</sup> The witness here did not produce the papers and journals containing the published market quotations and reports, but he testified that he kept up with the market, that he examined and was familiar with the reports and knew the market value to be as stated, because of the information derived from such published reports. This testimony was not incompetent as being hearsay, for the market value is indicated by the prices received and paid for articles of commerce by those dealing therein, and a witness who was present and saw the general public sales made at the prices offered and accepted could testify thereto in establishing the market value of that article or commodity at the time and place without producing the bids and acceptances or having published copies thereof, and it was competent for him to testify to the market value of the article in a particular market, as he did, without producing the published reports and quotations in support of his statement; the fact that his statement was based up-

are accurate, authentic, or that the tests embraced therein were made under similar conditions. *Missouri K. & T. Ry. Co. of Texas v. Dale Bros. Land & C. Co.* (Tex. 1915) 179 S. W. 935.

A pamphlet or other document, purporting to have been used by the government or under the authority of some department of the government, has, *prima facie*, no

more weight, as evidence, nor greater authenticity or verity, than documents issued by other authority. *Missouri K. & T. Ry. Co. of Texas v. Dale Bros. Land & C. Co.* (Tex. 1915) 179 S. W. 935.

92. *St. L. I. M. & S. Ry. v. Laser Grain Co.*, (Ark., 1915), 179 S. W., 189, 191.

92½. *St. L. & S. F. Ry. Co.*

on such knowledge without producing the reports, price lists, and quotations going rather to the credibility of the testimony than to its competency.<sup>93</sup> In proceedings of this nature the general rule that parol evidence is inadmissible to vary the terms of a written contract is observed. Thus, at the trial of an action for loss and damage an express carrier offered to prove that the failure to insert a valuation in clause 5 of the contract opposite the words "number and kind, value each," was an error of its agent at Milwaukee. It was too late to correct an error of this kind after the shipment had been made, the injury sustained, and the right of action accrued. Such correction would, in effect, alter the terms of a written contract, not upon the ground of a mutual mistake, but because an agent is willing to say that he did not follow the instructions of his principal in preparing it for execution.<sup>94</sup> Where live stock was unloaded at certain stockyards by a railroad only to feed and water them as required by law, evidence that after they were unloaded they were in bad condition was competent to go to the jury on the issue of injury in transit by the carrier, although the carrier can be called upon to account for injuries only when the shipper shows that the shipment was damaged in transit.<sup>95</sup> In an action for damages to a shipment, a certificate of a health commissioner, showing the condemnation of similar goods shipped by others than the plaintiff, is admissible where the record shows that all of the goods covered by the certificate were embraced in the shipment.<sup>96</sup> In

v. Pearce, 82 Ark. 358, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 125.

93. St. Louis I. M. & S. R. Co. v. Laser Grain Co. (Ark 1915), 179 S. W. 189, 191.

In an action for damages to a shipment of cattle the admission of extracts in the nature of market notes or review, showing on their face that they were no part of the market quotations, was prejudicial error, though claimants might

have established market value by market reports from publications regarded and recognized as correct. San Antonio & A. P. Ry. Co. v. Shankle & Lane (Tex. 1916) 183 S. W. 115.

94. U. S. Horseshoe Co. v. American Express Co., 95 Atl., 706 708.

95. Cincinnati, N. O. & T. P. Ry. Co. v. Smith & Johnston, (Ky. 1915), 176 S. W. 1013.

96. Perkett v. Manistee & N. E. R. Co., (Mich. 1916), 157 N. W.



an action by a showman for delay in the shipment of his piano, testimony as to declarations, made by girls who sang in the show, as to whether there was any exhibition on certain nights, was inadmissible as hearsay.<sup>97</sup> In a passenger's suit for the alleged wrongful withholding of his baggage by the carrier, evidence that at a later time than the transaction in suit a similar occurrence as to payment of excess fares was observed was inadmissible as immaterial and irrelevant.<sup>98</sup> Under a petition, in an action against a carrier for loss of freight, which described the freight as household goods of a family, evidence of the loss of wearing apparel, clothing, etc., was admissible.<sup>99</sup> In a shipper's action against railroad receivers for damages to a shipment of cattle from the delay, rough handling, etc., testimony of claimant that before shipment reached a point on the line of the initial carrier the conductor told him that he had received a telegram that the receivers of the connecting road had no facilities for taking care of the stock, and of the conductor that he had been notified by telegram from the trainmaster of the initial carrier to the same effect and had communicated such notice to the man in charge of the stock, was hearsay and inadmissible to prove that such notice came from the receivers.<sup>100</sup> In an action against an express company for the loss of a shipment in transit, the exclusion of a copy of a letter from plaintiff to his attorneys, wherein he made a statement in conflict with his wife's testimony as to the charges paid on the shipment, was harmless, where the court, though rendering judgment for claimant, found contrary to such testimony.<sup>101</sup> In an action for injury to shipment of live stock, a contract of shipment, part of the stipulations of which were void, and the other portion of which were not properly pleaded, is properly rejected.<sup>102</sup> In an action for the death of part, and in-

388.

97. *Piero v. Southern Express Co.*, (S. C. 1916), 88 S. E. 269.

98. *Davis v. Atlantic Coast Line R. Co.*, (S. C. 1916), 88 S. E. 273, 274.

99. *St. Louis, I. M. & S. Ry. Co. v. Wallace*, (Tex. 1915), 176 S. W. 764, 765.

100. *Hovey v. Halsell-Arledge Cattle Co.*, (Tex. 1915), 176 S. W. 896.

101. *Wells Fargo & Co. Express v. Powell*, (Tex. 1915), 177 S. W. 988.

102. *Southern Kansas Ry. Co. of Texas v. Hughey*, (Tex. 1915), 182 S. W. 361, 362.

jury to the remainder, of a shipment of hogs, where the railway company, which pleaded that it was the duty of the shipper to properly feed, water, and care for the hogs en route, went to the trial without objecting to the shipper's failure to controvert the answer, its right to insist that the averments to the answer should be taken as confessed was waived.<sup>103</sup> In an action to recover the value of hogs, which died in transit, and for damages to the remainder, admission of evidence as to the value of the hogs at the point where the dead ones were removed is harmless, though erroneous, where evidence showed the value of such animals at the point of destination was greater than their value at such intermediate point.<sup>104</sup> In an action for damage to a shipment of bananas which the carrier contracted to protect against cold by housing, where the charge rendered the fact that the carrier's roundhouse could not accommodate the cars of fruit not a valid defense, the erroneous admission of testimony as to another roundhouse was harmless.<sup>105</sup> In an action for damage to a shipment of bananas from Galveston to Chicago, the improper admission of testimony as to the value of bananas in Galveston was harmless, where it was fully shown what their market value would have been in Chicago in good condition, and that they were valueless when delivered, and under proper instructions the jury based the verdict on value at Chicago.<sup>106</sup> In an action for damage to a shipment of bananas which a carrier had agreed to place in its roundhouse on request of the messenger who traveled with them, testimony as to roundhouses on other roads than those of the contracting carriers was inadmissible.<sup>107</sup> In an action for damage to a shipment of bananas with which a messenger traveled to watch the weather and request that they be

Letter by shipper to connecting carrier: *Baltimore C. & A. Ry. v. Sperber* (Md. 1913), 84 Atl. 72, 74.

103. *Southern Kansas Ry. Co. of Texas v. Hughey*, (Tex. 1916), 182 S. W. 361.

104. *Southern Kansas Ry. Co. of Texas v. Hughey*, (Tex. 1916), 182 S. W. 361.

105. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

106. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

107. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

housed when it was cold, testimony as to the condition of the bananas before they were delivered was admissible against the carrier, as the messenger had no control over the cars.<sup>108</sup> In an action for damages for injuries to a shipment of live stock conveyed in several cars, where the animals, after delivery to destination, were commingled and the condition of all was about the same, evidence of the condition of animals in a car as to which no written notice of damages was served though such notice was a condition precedent to recovery, is admissible to show the condition of the animals in the other cars.<sup>109</sup> In a suit for damages to a shipment of cattle, the refusal to admit a record made by a witness who was live stock inspector at the market and who inspected the cattle on arrival, purporting to show the condition of the cattle and of the car, was not error, where the witness testified to the same facts from actual memory.<sup>110</sup> In an action for injuries to a shipment of peanuts, which claimant claimed was caused by want of ventilation, evidence that green peanuts, if confined before sufficiently dry, would necessarily be damaged is admissible.<sup>111</sup> In an action against a railroad for delay in the shipment of poultry and for loss of part of the shipment, where the answer alleged that the shipment was made under the law in such cases provided, the public and published tariffs of the carrier, and particularly a bill of lading, a copy of which was attached, marked Exhibit A, all of the various agreements of which bill of lading the carrier pleads as a part of the answer, the bill of lading, and tariffs approved by the Interstate Commerce Commission were sufficiently pleaded to allow their introduction in evidence to show the terms of the shipment.<sup>112</sup> A deposition cannot be received in evidence, where the party offering it served no notice upon the adverse party, who had no opportunity to submit cross-interrogatories.<sup>113</sup> Where, in a loss and damage case

108. *Illinois Cent. R. Co. v. Freeman*, (Tex. 1916), 182 S. W. 369.

109. *Texas & P. Ry. Co. v. McMillen*, (Tex. 1916), 183 S. W. 773.

110. *St. Louis Southwestern Ry. Co. of Texas v. Kerr*, (Tex. 1916),

184 S. W. 1058, 1059.

111. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1070.

112. *Wegener v. Chicago & N. W. Co.*, (Wis. 1916), 156 N. W. 201.

113. *Illinois Cent. R. Co. v. Peel*,

after depositions were suppressed because the certificate of the notary was defective, the certificate was amended, and there was no intimation that the integrity of the depositions had not been preserved, or that they had not been properly transmitted, no prejudicial error was committed in setting aside the order suppressing the depositions and permitting them to be read.<sup>114</sup>

**G. Judicial Notice.** The courts take judicial notice of facts of everyday knowledge in loss and damage cases the same as in any other kind of litigation. Thus it is a matter of general knowledge, of which courts will take judicial notice, that common carriers by rail make a practice of carrying as baggage the sample trunks of traveling salesmen.<sup>115</sup> And the Supreme Court of the United States will take judicial notice of the fact that the raising of citrus fruits is one of the great industries of Florida.<sup>116</sup> A court takes judicial notice of the way in which the business is handled in the stockyards in Chicago.<sup>117</sup>

**H. Questions for Jury.** Naturally the jury play a most important role in loss and damage cases. In all these claims, almost without exception, the contentions of the claimant and the carrier present diametrically opposed contentions of fact, which it is the duty of the jury to settle.

In an action against a carrier for damages to a shipment of hogs occurring while in its loading pens, the question of whether there was a delivery and acceptance by the carrier or due care on the part of plaintiff in placing the hogs in the pen and the condition of the pen, are questions of fact for the jury.<sup>118</sup>

(Miss. 1916), 70 So. 887.

114. *St. Louis, I. M. & S. Ry. Co. v. Starbird*, (Ark. 1915), 177 S. W. 912, 913.

115. *Kansas City M. & O. Ry. Co. v. Fugatt*, (Okla. 1915) 150 Pac. 669, 670.

116. *Sligh v. Kirkwood*, 35 Sup. Ct. 501, 503, 237 U. S. 52, 59 L. Ed. 835.

117. *Hudson v. Chicago, St. P.,*

*M. & O. Ry. Co.*, 226 Fed. 38, 44.

118. *Reading v. C. B. & Q. R. Co.* (Mo. 1915), 173 S. W. 451.

In an action against an express company for the value of a typewriter which it had refused to deliver to the consignee on his payment of charges, held on the evidence that whether the willful refusal was ratified by an officer of the company empowered to do so

It is a question for the jury to say whether a shipper of live stock is in the exercise of reasonable diligence in not shipping his hogs by a regular freight train instead of waiting for a regular live stock train in order to reach a certain market by a designated time, where it appears that the freight train would not stop and that when the train was not in motion the hogs would fight and injure themselves, while they would not do this when the train was in motion.<sup>119</sup> The Federal Twenty-Eight Hour Law, which fixes the time cattle can be kept in transit by the railway company at 28 hours, is not a grant of privilege to the carrier authorizing it to confine the stock for the period of time therein mentioned, irrespective of the question of negligence in so doing. The question of negligence is still left as at common law, notwithstanding the statute.<sup>120</sup> The question as to whether a shipment of horses was in proper condition for transportation or whether they were damaged through rough handling on the part of the carrier, is exclusively one for the jury.<sup>121</sup>

was for the jury. *Southern Express Co. v. Reagin*, 228 Fed. 14.

In an action against a carrier of live stock for damage to a shipment through becoming infected when unloaded at a stockyard for resting in transit, claimant's case, under a count of the complaint declaring on the carrier's negligence as a common carrier in violation of its legal duty, held for the jury. *Nashville, C. & St. L. Ry. v. Farrell & Braley* (Ala. 1916) 70 So. 986, 987.

119. *J. W. Stewart & Son v. C. R. I. & P. Ry. Co.* (Ia. 1915), 151 N. W., 485, 487.

120. *Durrett v. Chicago, R. I. & P. Ry. Co.* (N. Mex. 1915) 146 Pac. 962, 963.

121. *U. P. R. Co. v. Libby*, (Colo. 1915), 146, Pac. 1076.

It was a question of fact whether, having undertaken the duty of transportation of onions in a closed

car, the defendant railroad company knew, or in the exercise of ordinary diligence should have known that the contents of the car were perishable. *South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co.* (Mass. 1916) 111 N. E. 367, 368.

In a suit for damages to a shipment caused by improper icing, the submission to the jury of the question whether there was proper icing is improper where the only evidence thereon is the testimony of one who did not examine the ice bulkers, but concluded from going into the car and not feeling cold air that it had not been properly iced. *Perkett v. Manistee & N. E. R. Co.* (Mich. 1916) 157 N. W. 388.

In an action for damage to a shipment of cattle from their escape from defendant railroad's receiving pens, issues of whether the cattle

It is competent for a carrier's local station agent to arrange for all details in relation to furnishing cars and loading and re-

were normal, or wild and unruly, and whether the pens were not reasonably secure, held, for the jury under the evidence. *Hardesty v. Atchison T. & S. F. Ry. Co.* (Mo. 1915) 179 S. W. 725.

In a shipper's action for a carrier's conversion of "scrap brass" delivered to it for transportation, defended on the ground that claimant did not own it and that defendant had allowed various railroads to retake their own property, held to make a prima facie showing for claimant, and so make the question one for the jury. *Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co.* (Mo. 1916) 181 S. W. 1080.

Evidence in a suit for damages based upon a general allegation of the carrier's negligence in the transportation of cattle held to authorize an inference of negligence sufficient to make a prima facie case so as to make a question for the jury. *Greening v. Chicago & N. W. Ry. Co.* (Mo. 1916) 183 S. W. 1121.

In suit against a railroad for loss of clothing from a suit case, the road's liability for the loss as a gratuitous bailee held for the jury under the evidence. *Perry v. Seaboard Air Line R. Co.* (N. C. 1916) 88 S. E. 156, 157.

Where there is direct conflict in the evidence as to a question of fact, the jury is the sole judge thereof. *Davis v. Atlantic Coast Line R. Co.* (S. C. 1916) 88 S. E. 273, 274.

Whether claimant, whose horse

was injured by defendant, was guilty of contributory negligence in not having it treated by a veterinary and in using it too soon, held, under the evidence, a question for the jury. *Andrews v. Viraldo*, (Tex. 1915), 176 S. W. 737.

Customs of trades and provisions not repugnant to express statutes or rules of law have the force of law, but whether a custom exists, is one of fact. *Missouri, K. & T. Ry. Co. of Texas v. Ryon*, (Tex. 1915), 177 S. W. 525.

An initial carrier of live stock required the shipper to accompany the stock, and at intervals look after the same. It failed to properly bed the car, which, while on a side track of the connecting carrier, was struck by cars operated by the connecting carrier, so violently as to throw one of the animals on the floor, injuring the shipper then in the car. Held, that whether the failure to properly bed the car was negligence, and if negligence, it concurred with the act producing the result, was for the jury. *Missouri, K. & T. Ry. Co. v. Ryon*, (Tex. 1915), 177 S. W. 525.

In an action for injury to a mare in transit, whether the claimant's own agent had been guilty of contributory negligence in continuing shipment of the mare after she was kicked in the shipping pens, held, for the jury under the evidence. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.*, (Tex. 1915), 180 S. W. 1170.

Where, in an action against a

ceiving the same for transportation.<sup>122</sup> Where such an arrangement was made, and, before word that the train would not run the next day reached shippers, they had caused the stock to be placed in the company's yards, ready to load, a jury might well find that the company refused to carry the property when agreed and that in not so doing there was an unreasonable delay.<sup>123</sup> In a suit for the death of cattle, it was shown in evidence for the carrier that a bull and 9 hogs were loaded in one compartment of the stock car, the bull being tied, and the cows and calves loaded in another compartment of the car; that they were loaded a short time before 3:15 p. m., the hour

stockyards company for injuries to live stock from the negligence of the carrier's servants, there was some evidence that such servants were under direction of claimant's agent, but the evidence did not conclusively show that such agent had exclusive control over them, the question whether the carrier was liable as for the negligence of its servants for injuries from their failure to give prompt notice of the arrival of the stock and properly care for them until such notice was given was for the jury. *Hovencamp v. Union Stockyards Co.*, (Tex. 1915), 180 S. W. 225.

In an action against an express company for the conversion of a package which had been misssent, by refusing delivery on payment of charges, the court's refusal to charge that the express agent at the sending office, in writing the tag to be placed on the package, was acting as the amanuensis of the shipper, was proper, where the question of claimant's knowledge that the tag misstated the destination had already been submitted to the jury with instructions that

if the mistake was the shipper's he could not recover, and was in any case not prejudicial to the defense, as the matter was only important on the question whether the company could properly charge for transportation from the mistaken to the proper destination, and payment of full transportation had been tendered. *Southern Express Co. v. Reagin*, 228 Fed. 14, 15.

In an action against an express company to recover the value of a typewriter which had been wrongly addressed and which it had refused to deliver to the consignee on his payment of transportation charges, where the evidence as to whether such refusal had been ratified by any officer authorized thereto was conflicting, defendants requested instruction predicated on the absence of any evidence of ratification was properly refused. *Southern Express Co. v. Reagin*, 228 Fed. 14, 15.

122. *Wood v. Railway*, 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861.

123. *J. W. Stewart & Son v. C. R. I. & P. Ry. Co.*, (Ia. 1915), 151 N. W. 485, 487, 488.

at which the train was due by which the car was expected to be moved; that on the day in question, however, the train was delayed, and that between 4 and 5 o'clock, section men working in the vicinity discovered a commotion among the cattle in the car; that, upon investigation, it was disclosed that one of the cows was fighting the others, and the noncombatants were huddled together in one end of the car; that the men got the cattle quieted down and left them; that none of them at that time had been injured apparently, except that one of the calves was down; that shortly after 5 o'clock the yard foreman, hearing a tumult in the car, notified the railroad agent, and they went together to the car; that they found the militant cow still fighting, and the remainder of the cows huddled and entangled and piled together in the end of the car; that the crew of section men was sent for, and the cattle unloaded from the car. That 7 cows and 3 calves were either dead or so badly injured that it was necessary to kill them. The remainder of the shipment was forwarded to destination; but one of the cows so forwarded was crippled, and brought only \$4 when sold. It is contended by the carrier that it proved that the injuries to the animals were due to the inherent nature and propensities thereof, and that it thereby absolved itself from legal liability, and was entitled to a directed verdict at the close of its evidence. It was held the carrier erred in stating the effect and extent of the evidence introduced by it. It was not directly proven that the 10 dead animals were killed by the militant cow. It was proven that one of the cows had mobilized and was on the warpath; and it was proven that there were found in the car 10 dead animals; but it was not directly proven that the militant cow killed them, or exactly how they were killed. The evidence for the railway company was sufficient to raise a strong inference of fact that the dead cattle were killed by reason of the attacks of the enraged cow. However, it was in evidence that the dead cattle were skinned, and there were on their hides no indications that any of them were gored to death, and their death may have resulted in some other manner. Where a fact is sought to be established by indirect evidence, it is the



peculiar province of the jury to draw inferences from the facts proven; and, where more than one inference may reasonably be drawn, or where a certain inference may reasonably be drawn or declined to be drawn, the matter is for the jury. It is only when all the circumstances, taken together, inevitably point to and afford but one reasonable explanation, that such evidence may be taken as conclusively raising an inference of the fact sought to be established thereby. So whether the railway company showed that the injuries to the animals were caused by the militant cow and thereby absolved itself from legal liability was for the jury.<sup>124</sup>

It is a question for the jury as to whether a railroad is guilty of rough handling in transporting a live stock shipment.<sup>125</sup> And in an action for loss and damage to fruit from delay the question whether the damage was caused by fault of the carrier or by delay in receiving the goods is a question for the jury to decide.<sup>126</sup>

Where, in an action against an express company for injuries to a colt while in the carrier's charge, it appeared that the injury, a broken hip, was such that it could not have resulted from natural causes, and that the barn where the company had placed the colt temporarily during the night was an unsafe place, by reason of a hole in the floor, the question whether the injury was due to negligence of the carrier was for the jury, though there was no direct evidence as to the cause of the accident.<sup>127</sup> So the question as to whether damage to vegetables by heat was due to the negligence of the shipper is a question of fact for the jury to determine.<sup>128</sup>

124. *Adams v. Tiernan*, 5 Dana, 394; *Dolfinger & Co. v. Fishback*, 12 Bush, 474; *Cent. Coal & Iron Co. v. Owens*, 142 Ky. 19, 133 S. W. 966; 38 Cyc. 1517; *C. N. O. & T. P. Ry. Co. v. Veatch*, (Ky. 1915), 172 S. W. 89, 91.

125. *Eoff & Snapp v. Scullin*, (Ark. 1915), 179 S. W. 663, 664.

126. *Trakas v. Southern Ry. Co.* (S. C. 1915), 86 S. E. 492.

127. *U. S. Horseshoe Co. v. American Express Co.*, 95 Atl. 706.

128. *Watson v. Union Pac. R. Co.*, (Mo. 1915), 178 S. W. 871, 872.

When the last successive carrier seeks to relieve itself from liability for damages, caused by delay in

**I. Argument of Counsel.** In an action for injury to live stock it is improper for the attorney of the claimant to use as an argument to the jury, the fact that the railroad witnesses testified as they are told, in order to hold their jobs.<sup>129</sup>

**J. Instructions and Verdict.** As in other cases, a verdict of a jury in this class of litigation will not be set aside except for clear and convincing reasons. That is, the trial court should be convinced the verdict is clearly against the weight of the evidence. The instructions of the court are therefore an important factor, and if incorrect or biased may easily work considerable harm to either side. An instruction to the jury in a loss and

an interstate shipment of watermelons, because the bill of lading contained a condition that the carrier, except in case of negligence, should not be liable for damage to property resulting from delay in transportation if such delay is caused by a strike, and the evidence tended to show: (1) That the strike was over before the shipment was received by the carrier; and (2) that the delay was caused by the use by the carrier of the watermelon tracks at the destination point, during and following the strike, in the delivery of peaches usually delivered elsewhere, to the exclusion of watermelons, which were placed on storage tracks at an intermediate point, the question whether the delay was caused by the negligence of the carrier or by the strike was for the jury. *Carr v. Penn. R. Co.*, (N. J. 1916), 96 Atl. 588.

Any presumption that the initial carrier delivered to the connecting carrier the same amount of corn that the shipper delivered to it, being one of fact, and whether the evidence justified it being

a question for the jury, they should not be instructed that they may believe the same amount was delivered, without being required to first find that the evidence of necessary facts to create the presumption or inference should be believed. *Equity Elevator Co. v. Union Pac. Ry. Co.*, (Mo. 1915), 177 S. W. 773.

The value of expert testimony is entirely for the jury, who may accept or reject it as they think proper, and a verdict so supported cannot be said to be wholly without evidence to sustain it. *Lamb v. Moor*, (Ga. 1916), 87 S. E. 837, 838.

Where there is a conflict in the evidence as to where goods were to be delivered by vendor to vendee, the question must be submitted to the jury in order to determine whether title has passed to the vendee. *Engemann v. Delaware, L. & W. R. Co.*, (N. J. 1916), 97 Atl. 152.

129. *Kansas City, M. & O. Ry. Co. v. Cave*, (Texas 1915), 174 S. W. 872, 874.

damage case, that it may indulge the presumption, in the absence of direct evidence of negligence on the initial carrier's part, that the damage did not result from its negligence, but did result from negligence on the part of the delivering carrier is proper.<sup>130</sup>

130. *Stolze v. Ann Arbor R. Co.*, 148 Wis. 205, 134 N. W. 376; *Trade-well v. Chicago & Northwestern R. Co.*, 150 Wis. 259, 136 N. W. 794; *Best v. G. N. Ry.*, (Wis. 1915), 150 N. W. 484, 486.

In an action against a carrier where specific negligence in the carriage of goods is pleaded, recovery must be had on that ground, or not at all. *Keithley v. Lusk*, (Mo. 1915), 177 S. W. 756.

Where two actions present the same parties or their privies, the same subject-matter, and the same claim or demand, a judgment in the first action, if rendered on the merits, constitutes an absolute bar to a second action, whether the action be *ex contractu* or *ex delicto*; for the reasons that no one should be twice vexed for the same cause and that a judgment on the merits destroys a cause of action, which necessarily destroys all its component parts. *Danciger v. American Express Co.*, (Mo. 1915), 179 S. W. 806.

In an action against a railroad for damages to five carloads of mules in transit through the carrier's failure to sand the floor of the cars, so that the mules were thrown down repeatedly and incited to kick and bite, verdict for \$900 held not excessive. *Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co.*, (Mo. 1915), 180 S. W. 412.

Where there was a conflict in the testimony of the witnesses, an

instruction that, if the jury believed that any witness had knowingly sworn falsely to any fact material to the issues, they might reject all or any part of his testimony, was proper. *Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co.*, (Mo. 1916), 181 S. W. 1080, 1081.

Where, in an action against a carrier for injuries to live stock during transportation, the court correctly charging on the measure of damages, the carrier's objection to evidence as to what two or more of the animals were worth per day for work was not material. *Kolk-meyer v. Chicago & A. R. Co.*, (Mo. 1916), 182 S. W. 794.

In an action for injuries to an interstate shipment of live stock, a mere inadvertent omission of the court to charge that the value of the injured animal should be determined at the place of shipment where that was inferentially stated, cannot be reviewed without exception. *Washington Horse Exchange v. Louisville & N. R. Co.*, (N. C. 1916), 87 S. E. 941.

In an action against a carrier for conversion, where the testimony of the station agent at the point to which the consignee desired to have the goods reshipped that he had authority to arrange for such reshipment was not contradicted, a finding that an agreement with him for such reshipment was not binding was error. *Whit-ley v. Gulf, C. & S. F. Ry. Co.*, (Tex. 1916), 183 S. W. 36.

A charge of the trial court told the jury that if the train or trains in which cattle were being transported were roughly handled, by "ramming or jamming the cars together, knocking

In an action against a railroad for damages to a shipment of live stock, an instruction, authorizing a double recovery, was erroneous. *Kansas City, M. & O. Ry. Co. v. Russell*, (Tex. 1916), 184 S. W. 299.

Under the statutes, where a charge is erroneous, the party aggrieved need only except, pointing out the defects and reserving objection by proper bill of exceptions, though a party aggrieved by an instruction, correct as far as it goes, must request a correct charge, covering the omitted issues or the facts not covered by the main charge. *Kansas City, M. & O. Ry. Co. v. Russell*, (Tex. 1916), 184 S. W. 299.

In a suit for damages to a shipment of cattle based on allegations of negligence in several respects, an instruction submitting the converse of the theories on which claimant was to recover, omitting one of the issues of negligence, was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Kerr*, (Tex. 1916), 184 S. W. 1058.

The granting of a new trial after a verdict has been directed by the court is a matter which is largely within the discretion of the trial judge, and such discretion will not, as a rule be interfered with unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found, and that the errors, if any, which were committed by the trial judge, were clearly not prejudicial. *Knapp v. Minneapolis, St.*

*P. & S. S. M. Ry. Co.*, (N. Dak. 1916), 156 N. W. 1019.

In an action against the initial and connecting carriers for delay in transporting live stock, a finding of concurrent negligence by both carriers, and a finding that the initial carrier tendered the stock to the connecting carrier, while its train was on its track and about to leave, but that it refused to then accept the shipment, are inconsistent, and the second finding controls the first, and a judgment against both carriers cannot be sustained. *St. Louis S. W. Ry. Co. of Texas v. Miller & White*, (Tex. 1915), 176 S. W. 830.

In a suit for damages to a shipment of cattle, where there was no evidence of a want of care in loading the cattle, an instruction that a want of care would be negligence was without support in the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Kerr*, (Tex. 1916), 184 S. W. 1058, 1059.

Where, in an action against a carrier for injuries to a shipment of horses, a requested instruction that the value of the horses should be determined at place of shipment does not, where such instruction also contained improper directions, render the failure of the court to so charge erroneous, for an instruction must be good as a whole before the court will be put in error for refusing it. *Washington Horse Exchange v. Louisville & N. R. Co.*, (N. C. 1916), 87 S. E. 941.

the cattle down and against each other, thereby injuring them," to find for the claimant such damages as resulted to the cattle

An instruction abstractly correct is properly refused, where there is no evidence presenting the facts embodied therein. *Schloss-Bear-Davis Co. v. Louisville & N. R. Co.*, (N. C. 1916), 88 S. E. 476.

In suit against a railroad for the loss of two pairs of trousers from a suit case, where the evidence that the clothing was in the suit case when delivered to the carrier was not so clear as to free the question from doubt, an instruction assuming that such fact was established, in telling the jury that the loss occurred while the suit case was in the carrier's hands, was erroneous. *Perry v. Seaboard Air Line R. Co.*, (N. C. 1916), 88 S. E. 156.

In an action for injuries to a shipment of horses, where there was no pleading or proof that the carrier failed to furnish proper facilities for unloading and reloading the horses, error in an instruction that it was the carrier's duty to furnish proper facilities for such purpose and to unload and reload the horses, and that the shipper might recover all damages arising from the failure of the carrier to unload and reload, as required by law, or for such damages as were occasioned while they were being unloaded and reloaded, arising from the carrier's negligence, which was given in connection with an instruction that the horses must be unloaded, fed, watered, and rested every 28 hours, and the carrier was not liable for delay occasioned thereby, is not prejudi-

cial, since the reference to the facilities for unloading and reloading was evidently only introductory. *Southern Pac. Co. v. W. T. Meadors & Co.*, (Tex. 1915), 176 S. W. 882.

In a shipper's action for damages for injury to stock, where the jury, in answer to interrogatories, found the items of damage, but there was no request that the court submit the issue of the amount of damages recoverable, the court had a right to find that fact itself from the items fixed by the jury. *Texas & P. Ry. Co. v. Erwin*, (Tex. 1915), 180 S. W. 662.

In an action for injury to a shipment of live stock, the court can declare that the evidence establishes contributory negligence on the part of the shipper or his agents as a matter of law only where there has been a violation of some statute or where the evidence is without material conflict and admits of no other reasonable conclusion. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.*, (Tex. 1915), 180 S. W. 1170.

A finding involved in a judgment must be treated with as much deference as if made by the jury. *Texas & N. O. R. Co. v. Weems*, (Tex. 1916), 184 S. W. 1103.

In an action by a shipper for injuries to a shipment, the giving of numerous charges, declaring that under enumerated circumstances verdict should be for the shipper, but not declaring that a failure of proof would require verdict for the carrier, was not error to claimant's

therefrom. It was held it was clear, that the phraseology used by the court in submitting this issue to the jury was overdrawn and calculated to give the issue a significance in the mind of the

injury. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1070.

Though any opinion by the court as to the weight, effect, or sufficiency of the evidence submitted to the jury, or any assumption of a fact as proved, is an invasion of the province of the jury, it is proper when there is no evidence on an issue to so state to the jury. *Norfolk Southern R. Co. v. Norfolk Truckers' Exchange*, (Va. 1916), 88 S. E. 318.

In an action by a packet company against defendant common carrier operating an incline from vessels to the cars of a railroad company to recover the value of goods lost by reason of the carrier's negligence, where the carrier contended that he told his engineer not to load more than 50 sacks of rice on one car at a time, and that claimant placed 96 sacks on one of the cars and so overloaded it as to cause the loss, an instruction that if claimant placed 96 sacks on one of the cars in violation of the carrier's instructions and that the overloading of the car was the cause or one of the causes of the loss, to find for the carrier, was as favorable to the carrier as he could ask. *Joest v. Clarendon & Rosedale Packet Co.*, (Ark. 1916), 183 S. W. 759.

Where a motion is made to exclude certain testimony in its entirety, some of which is clearly admissible, a new trial will not be

granted because the court refuses to exclude the entire testimony, although some of it may be of doubtful admissibility, or not admissible. *Louisville & N. R. Co. v. McHan* (Ga. 1916) 87 S. E. 889, 890.

Where the form of the verdict was clear and showed that the interest of claimant, who replevied the goods, was qualified, the improper use of the word "bailee" would not invalidate the verdict. *Exchange Nat. Bank v. McCaffery* (Ia. 1916) 157 N. W. 209, 210.

In an action against a carrier for damages to shipments of tobacco, an instruction that it was the duty of the carrier and its connecting carriers, after the tobacco had been damaged by flood at an intermediate point, and as soon as conditions there would permit, to promptly carry it to destination, and that the carrier and its connecting carriers failed to perform such duty by reason of which the tobacco was further damaged, in so far as bearing on the question of promptness, merely prefatory and abstract, and not submitting the question itself, was not prejudicial to the carrier. *Louisville & N. R. Co. v. E. J. O'Brien & Co.* (Ky. 1916) 182 S. W. 227.

Where the declaration of a consignor of goods against the carrier alleged negligent delay, negligent icing, and packing in an improper car, instructions that if there was

jury to which it was not entitled under the evidence, since there is no evidence that the cars, or the "train or trains," in which the cattle were being conveyed were "rammed or jammed together," or that the cattle, or any of them, were knocked down or against each other by any such handling of the train or trains, or otherwise, as indicated in the charge. In such state of the evidence the use of the intense terms, "ramming," or "jamming" the cars together, and the language "knocking the cattle down and against each other, thereby injuring them," was improper and prejudicial to the carrier and required a reversal of the case as to it.<sup>131</sup> But a verdict will not be set aside on the ground that the damages awarded are excessive, where the amount is not such as to induce the court to believe that the jury acted from prejudice, partiality, or corruption.<sup>132</sup> A verdict in favor of a claimant suing for loss and damage to perishable produce that he recover from the railroad a specified amount less freight charges, is defective as a general verdict.<sup>133</sup>

A carrier is entitled to a judgment in its favor in an action for damages for failure to properly ice a shipment of perishable produce en route, where the jury make a special finding that damage was occasioned at destination through the failure of

negligence on the part of the carrier in delivering the goods, the burden of showing that the damage was due to the delay in transportation is upon the carrier; that the carrier is not only responsible for any breach of its duty as common carrier upon its own line, but is responsible for breach of duty by any of the connecting carriers as well, and for negligence or unreasonable delay on its part or any of its connecting carriers—authorized the jury to consider only acts of negligence that might be brought directly within the declaration, or

such as were consequential thereon, and did not leave the whole matter of negligence or breach of duty as common carrier to the jury, though not within the declaration. *Norfolk Southern R. Co. v. Norfolk Truckers' Exchange* (Va. 1916) 88 S. E. 318.

131. *Texas & P. Ry. Co. v. White*, (Texas 1915), 174 S. W. 953, 955, 956.

132. *L. S. & M. S. Ry. Co. v. W. H. McIntyre Co.*, (Ind. 1915), 108 N. E. 978, 983.

133. *St. L. B. & M. Ry. Co. v. McClellan*, (Tex. 1915), 173 S. W. 258, 259.

the carrier's agent to notify the consignee of the exact amount of freight charges.<sup>134</sup>

Where it appears that in a shipment of cattle one cow was injured in the back, preventing her from standing up for about a week, and that some eight or ten head were bruised and skinned up and made no improvement for at least 10 days, and no evidence is introduced concerning their value except as to one steer which had a broken leg, a verdict of damages for the shipper cannot be sustained as there is no evidence to support it<sup>135</sup>

Where the undisputed evidence showed that a car of cattle was in the possession of the carrier between three and four hours at a point before being forwarded, and that while there the claimant notified an employe of the carrier who was in charge of the station that the cattle were suffering and should be unloaded, it is error for the trial court to instruct the jury that this was sufficient notice to require the carrier to take such steps as might be necessary to protect such cattle, since the evidence being uncontroverted, no issue is left for the jury to pass upon.<sup>136</sup>

A verdict of a jury for damages for delay in the transportation of a shipment based on no other evidence than the opinion of the shipper as to a reasonable time for transportation, must be set aside.<sup>137</sup>

134. *S. L. B. & M. Ry. Co. v. McClellan*, (Tex. 1915), 173 S. W. 258.

135. *Ball v. Lusk*, (Mo. 1915), 175 S. W. 238, 239.

136. *Colsch v. Chicago, M. & St. P. Ry. Co.*, (Iowa 1915), 153 N. W. 327, 330.

137. *Gulf, C. & S. F. Ry. Co. v. Bogy*, (Texas 1915), 178 S. W. 577, 578.

In an action for negligent delay in shipment of spinach, instruction that, if on a trip as long as the one in question the shipper in the exercise of reasonable care would have put more ice in the car, or

used a refrigerator car, or ordered re-icing, and his failure to use a refrigerator car or to order re-icing contributed to the loss, the jury must find for defendant was properly refused, where the evidence shows that a refrigerator car is not used for the transportation of spinach, since it should be kept moist as well as cool, and it is the ice water trickling down through the barrels that preserves its freshness. *Norfolk Southern R. Co. v. Norfolk Trucker's Exchange* (Va. 1916) 88 S. E. 318.

In an action by shippers of live



A verdict of a jury that injury to cattle was caused by freezing will not be disturbed as contrary to the evidence where it appears that the car of cattle which was frozen was unreasonably delayed on a side-track out in the country, 8 miles from St. Paul,

stock for delay in transit, peremptory instructions for defendants on the ground that the evidence was insufficient as a basis for damages on account of a decline on the day after the cattle arrived late were properly refused, where the evidence raised the issue of shrinkage in weight. *International & G. N. Ry. Co. v. Landa & Storey* (Tex. 1916) 183 S. W. 384.

In a suit for damages to a shipment of cattle from unreasonable delay, etc. a charge that the measure of damages was the difference between the value of the cattle as they were when they reached the market and their value if they had arrived in good condition and in reasonable time was objectionable, as assuming that there was a difference between the value of the cattle when they arrived and their value had they arrived earlier. *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Tex. 1916), 183, S. W. 115.

In a suit for damages to a shipment of cattle from unreasonable delay etc., a charge that, if the unreasonable delay caused the cattle to get to market a day later there was a decline in that market, the jury should find for the claimant the amount of damages thereby sustained, was reversible error, where the evidence did not show that there was any decline in the market between the day when the

cattle should have arrived and the day on which they did arrive, and where, for aught the court could tell, the jury might have based their verdict for plaintiff on such item of damages. *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Tex. 1916) 183 S. W. 115.

Where a shipper of live stock sought recovery for negligent delay, as well as mishandling, a charge that, if the shipment was forwarded on the first train, there could be no recovery, is erroneous, because disregarding other negligence. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361, 362.

Where there was some evidence of unnecessary delay in the transportation of horses and of rough handling, and abundant evidence that the horses were in poor condition on arrival, the jury were authorized to attribute such condition either to the delay or to the rough handling, and the shipper could recover the damages in either event. *Southern Pac. Co. v. W. T. Meadors & Co.* (Tex. 176 S. W. 882.

In an action for delay and injury to a shipment of live stock an instruction for claimant if it was found that the stock was damaged in any of the ways alleged in the petition and if such injuries proximately resulted from the carrier's negligence, was not objectionable as being against the weight of the

where the weather office showed a temperature of from 20 to 26 degrees above zero.<sup>138</sup>

Where, after a judgment had been rendered for loss of freight in transit, the carrier finds the missing shipment in August, which had been made in December of the preceding year, the denial of a new trial is within the discretion of the court.<sup>139</sup>

It has also been held the court must construe the proviso in the Twenty-Eight Hour Law providing that, when the animals are carried in cars in which they can and do have opportunity to rest, the provisions as to unloading shall not apply, and it is error to submit the meaning of the proviso to the jury.<sup>140</sup>

**K. Appeal.** A verdict for a shipper of live stock will not be set aside by an appellate court if there was evidence upon which

evidence, or in failing to direct a finding for the carrier, in the absence of proof of the affirmative of such issues, where such matters were contained in another instruction given. *Texas & P. Ry. Co. v. De Long* (Tex. 1915) 176 S. W. 874.

In an action against a carrier for negligent delay of a shipment of live stock, where the claimant's instruction permitted a recovery upon a mere finding of delay, as opposed to negligent delay, the carrier denying any delay until the shipment reached certain stockyards, and where the evidence showed that the shipment reached such stockyards at least three hours late, in view of subsequent instructions laying due emphasis on negligence as a necessary element of recovery, such instructions, read together under the facts, did not amount to misdirection. *Sikes v. St. Louis & S. F. R. Co.*, (Mo. 1915) 176 S. W., 255, 256.

In a suit against a carrier for damages caused by delay in an interstate shipment of watermelons, it is not erroneous for the trial judge to refuse to charge the jury "that it was the duty of the carrier to move the most perishable fruit first under the circumstances, and the holding back of less perishable fruit, viz., the watermelons, until the peaches had been delivered, was not negligence," when there was no evidence that the peaches in question were more perishable than the watermelons in question at the time both were being handled by the carrier. *Carr v. Penn. R. Co.* (N. J. 1916) 96 Atl. 588.

138. *Golsch v. Chicago, M. & St. P. Ry. Co.*, (Iowa 1915), 153 N. W. 327, 329.

139. *St. L. I. M. & S. Ry.*, (Ark. 1915), 176 S. W. 138, 139.

140. *Northern Pac. Ry. Co. v. Finch*, 225 Fed. Rep. 676.

the jury could have predicated its verdict.<sup>141</sup> A reviewing court not having the evidence before it, cannot disturb a finding of negligence, especially when a fact appears from which an inference showing negligence can be drawn.<sup>142</sup> And on appeal from a nonsuit submitted to by plaintiffs at the close of their evidence to avoid a directed verdict against them, the Supreme Court must assume that all inferences that may be drawn from the evidence are established.<sup>143</sup> On appeal questions should not be raised inconsistent with the theory on which the case was originally tried, nor which are not fully presented in the record. Thus on appeal from judgment in an action for damages to a shipment of live stock, the case not having been tried below on the theory that the railroad had ratified the unauthorized act of its station agent in receiving oral notice of the injury, judgment for the claimant could not be affirmed on the ground that such ratification had taken place.<sup>144</sup> Where title is not questioned in

141. *Houston v. T. C. R. Co. v. Lindsey*, (Tex. 1915), 175 S. W. 708, 711.

An appellate court cannot disturb a verdict on substantial conflicting evidence. *Blair Horse & Mule Co. v. St. Joseph & C. I. Ry. Co.* (Mo. 1915) 180 S.W. 412.

*Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co.* (Mo. 1916) 181 S. W. 1080.

The decision of the Court of Civil Appeals in a loss and damage case on appeal from the county court is final and a certificate to the Supreme Court does not lie, and, if the Supreme Court had jurisdiction by virtue of dissent, appellant was not deprived of the remedy by petition for writ of error. *Chicago R. I. & G. Ry. Co. v. Dalton*, (Tex. 1915) 177 S. W. 556.

Where the question raised by appellant was so well settled that

there was no reasonable ground for the appeal, the court, affirming it, should assess 10 per cent damages. *Texas & P. Ry. o. v. Erwin* (Tex. 1915) 180 S. W. 662.

In an action against a carrier for conversion, where the trial court found that both parties agreed that the carrier had the right to sell the goods at public auction unless an agreement had been entered into barring the right, an assignment of error that the carrier did not have such right will not be considered. *Whitley v. Gulf & S. F. Ry. Co.* (Texas 1916) 183 S. W. 36, 37.

142. *Astrella v. Laffey*, (Mass. 1916), 111 N. E. 681.

143. *A. E. Myers & Co. v. Norfolk Southern R. Co.*, (N. C. 1916), 88 S. E. 149.

144. *McElvain v. St. Louis & S. F. R. Co.*, (Mo. 1915), 180 S. W. 1018.

the lower court, objection to lack of proof of title cannot be made upon appeal.<sup>145</sup> In an action for damages for delay of a shipment of cattle a defense not pleaded or presented by the instructions cannot be raised on appeal.<sup>146</sup> Though on appeal defendant carrier relied on an alleged provision in the bill of lading, no effect can be given the provision where it did not appear in the abstract.<sup>147</sup> In an action for damages for failure to deliver a car of sugar which plaintiff had resold, a general objection to testimony by the general manager of claimant's business as to the sales, apparently on the ground that the sales were not made personally by the manager, will not support an assignment on appeal that the evidence was hearsay, that objection not being presented in any manner, as the motion for new trial merely declared that such evidence was incompetent, irrelevant, and immaterial.<sup>148</sup> An assignment of error, stating that "the judgment \* \* \* is contrary to the law \* \* \* and the evidence, \* \* \*" being too general will not be considered.<sup>149</sup> An assignment, complaining of the overruling of an objection to the evidence, presents nothing for review, where the evidence was in part admissible.<sup>150</sup> An assign-

145. *Yazoo & M. V. R. Co. v. Solomon*, (Ark. 1916), 184 S. W. 418.

146. *Rissler v. Missouri Pac. Ry. Co.*, (Mo. 1916), 183 S. W. 676.

147. *Riley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, (Mo. 1916), 184 S. W. 915, 916.

148. *Riley-Wilson Grocer Co. v. St. Louis & S. F. R. Co.*, (Mo. 1916), 184 S. W. 915.

Where the charge as a whole fairly presented the case, judgment will not be reversed on account of technical defects. *Panhandle & S. F. Ry. Co. v. Jones* (Tex. 1906) 182 S. W. 1.

In an action against a carrier of live stock for damages to certain shipments in transit, where, if the jury awarded to claimant his entire claim, the carrier's contract

liability was exceeded only to the extent of \$13.80 on 2 hogs and 2 cattle out of shipments aggregating about 150 head of stock, and where the verdict, in fact, instead of being for such entire claim for \$889, was only for \$500, the slight excess over the recovery permissible under the contract on a comparatively small portion of the shipment was not ground for reversal; since judgment will not be reversed for a trivial excess where the cost of another trial would exceed the reduction to which appellant is entitled. *Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston* (Ky. 1915), 176 S. W. 1013, 1014.

149. *Wardlaw v. Andrews*, (Tex. 1915), 180 S. W. 1161.

150. *Cleburne Peanut & P. Co.*

ment of error to the exclusion of testimony, too vague to show what testimony was excluded cannot be considered on appeal.<sup>151</sup> In the absence of a motion to set aside the jury's findings, an assignment of error based on the insufficiency of the evidence to support them will not be considered.<sup>152</sup> Where one of two carriers, defendants in action for damages to a shipment of cattle, had an instructed verdict in its favor, and the other suffered judgment and alone appealed, the judgment, though reversed and remanded as to the appellant, would be affirmed as to such defendant.<sup>153</sup> Whether the arrival of an interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part of the goods, leaving the rest, with the carrier's permission, to meet his convenience in removal, discharged the carrier's contract set forth in the bill of lading and created a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of a loss by fire, the burden of showing that it was not negligent, is a federal question which will support the appellate jurisdiction of the Federal Supreme Court

*v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1070.

151. *Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas*, (Tex. 1916), 184 S. W. 1070.

152. *Texas & N. O. R. Co. v. Weems*, (Tex. 1916), 184 S. W. 1103.

Where there is a conflict between a bill of exceptions and statements of facts as to the proceedings at trial the statement controls. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361.

Where the verdict was general, and it appeared that, as to some of the claims of recovery, claimant was not entitled, it will be presumed on appeal that no part of the recovery was on account of

such claim. *Southern Kansas Ry. Co. of Texas v. Hughey* (Tex. 1916) 182 S. W. 361, 362.

153. *San Antonio & A. P. Ry. Co. v. Shankle & Lane*, (Tex. 1916), 183 S. W. 115.

In an action against two railroad companies there was a judgment in favor of one, and the other appealed. There was no complaint as to the judgment in favor of the company which did not appeal nor was there any allegation of partnership or agency between the companies. Held that, though the judgment against the appealing railroad company was reversed, the judgment in favor of the other should not be disturbed. *Pecos & N. T. Ry. Co. v. Holmes* (Tex. 1915) 177 S. W. 505.

over a state court.<sup>154</sup> A judgment of the highest state court which affirms a judgment against a carrier because of a decline in market value, due to an unreasonable delay in the transportation of an interstate shipment, will not be reversed because the trial court, by its instructions, erroneously permitted the jury to award as damages the amount of such decline in value without reference to a limitation in the bill of lading and in the carrier's published tariff that the carrier's liability for loss or damage is to be computed on the basis of the value of shipment, plus the freight, at the time and place of shipment, unless a lower value is agreed upon, or because the trial court erroneously excluded such tariff with its conditions when offered in evidence, where, upon the facts as the highest court finds them to be, the agreed maximum of liability as stipulated is not exceeded by the judgment.<sup>155</sup> A federal question not raised in the trial court nor on appeal will not be considered by the Federal Supreme Court on writ of error to the highest state court.<sup>156</sup> The judgment of the highest state court ordering a bill and cross bill to be dismissed for want of jurisdiction is conclusive upon the Federal Supreme Court on writ of error unless the denial of a federal right is involved.<sup>157</sup>

154. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed.—, 36 Sup. Ct. 469.

155. *New York, P. & N. R. Co. v. Peninsula Produce Exch.*, 240 U. S. 34, 60 L. Ed.—, 36 Sup. Ct. 230.

156. *Illinois C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. 1306, 35 Sup. Ct. 760.

157. *Dayton C. & I. Co. v. Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 60 L. Ed.—, 36 Sup. Ct. 137.

Where the question involved in an action for damages to an interstate shipment of live stock, defended on the ground of the shipper's failure to give the notice of injury required by the written contract of shipment, was a federal question of which the Supreme Court of the United States had final

jurisdiction, a party, if the opinion of the Court of Civil Appeals was erroneous, had a plain, adequate, and complete remedy by due course of law, by proper application to the Supreme Court of the United States, so that it was not mandatory upon the Court of Civil Appeals to certify the case to the state Supreme Court. *Chicago R. I. & G. Ry. Co. v. Dalton* (Tex. 1915) 177 S. W. 556.

In suit for damage to an interstate shipment of live stock it is the duty of the Court of Appeals to apply the law relative to a stipulation as to the time of suit as interpreted by the Supreme Court of the United States. *Howard v. Chicago, R. I. & P. Ry. Co.* (Mo. 1916) 184 S. W. 906.

## APPENDIX

### THE TWENTY-EIGHT HOUR LAW

An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory, or the District of Columbia into or through another State or Territory or the District of Columbia and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes. Approved June 29, 1906. 34 Stat. L. 607.

**Animals—Time Limit Confinement on Cars, etc.** That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia, into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement the time consumed in loading and unload-

ing shall not be considered but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

**Feeding at Expense of Owner—Lien.** Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

**Penalty.** Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, That when animals are carried in cars, boats, or other vessels in which they can and do have proper



food, water, space and opportunity to rest the provisions in regard to their being unloaded shall not apply.

**Prosecutions.** Sec. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

**Repeal.** Sec. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

## **THE CUMMINS AMENDMENT**

(Public—No. 325—63d Congress.)

(S. 4522.)

An Act To amend an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

**Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,** That so much of section seven of an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: **Provided,** That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: **Provided, however,** That if the goods are hidden from view by wrapping, boxing, or other

means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: **Provided further**, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: **Provided further**, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: **Provided, however**, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

Sec. 2. That this Act shall take effect and be in force from ninety days after its passage.

Approved, March 4, 1915.

## **BILL OF LADING ACT**

(Public—No. 239—64th Congress.)

(S. 19.).

An Act Relating to bills of lading in interstate and foreign commerce.

**Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,** That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.

Sec. 2. That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.

Sec. 4. That order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: **Provided, how-**

ever, That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Sec. 5. That when more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: **Provided, however,** That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Sec. 6. That a straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 7. That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 9. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Sec. 10. That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes

action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 11. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 12. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 13. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 14. That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or de-



struction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: **Provided**, a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 15. That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Sec. 16. That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable

time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19. That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall

not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: **Provided, however,** Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

Sec. 23. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 24. That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate

jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

Sec. 25. That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

Sec. 26. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

Sec. 27. That an order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

Sec. 28. That an order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 29. That a bill may be transferred by the holder by de-

livery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Sec. 30. That an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 31. That a person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value; and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 32. That a person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of

this section unless an officer or agent of the carrier, the actual apparent scope of whose duties includes action upon such a notification, has been notified, and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

Sec. 33. That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 34. That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Sec. 35. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 36. That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 37. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 38. That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 39. That where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 40. That, except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgage or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 41. That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or

photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.

Sec. 42. First, That in this Act, unless the context of subject matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this Act.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee and to take as pledgee.



"State" includes any Territory, District, insular possession, or isthmian possession.

Sec. 43. That the provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 44. That the provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Sec. 45. That this Act shall take effect and be in force on and after the first day of January next after its passage.

Approved, August 29, 1916.

## Standard Form for Presentation of Loss and Damage Claims.

APPROVED BY  
THE INTERSTATE COMMERCE COMMISSION  
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE  
THE FREIGHT CLAIM ASSOCIATION .

(Name of person to whom claim is presented) ..... (Address of claimant) .....		(Claimant's Number) 1
(Name of carrier) ..... (Date) .....		(Carrier's Number)
Address .....		

This claim for \$..... is made against the carrier named above by .....  
 (Amount of claim) ..... (Name of claimant)  
 for ..... in connection with the following described shipments.  
 (loss or damage) .....

Description of shipment .....  
 Name and address of consignor (shipper) .....  
 Shipped from ..... To .....  
 (City, town or station) ..... (City, town or station)  
 Final Destination ..... Routed via .....  
 (City, town or station) .....

Bill of Lading issued by ..... Co. Date of Bill of Lading .....  
 Paid Freight Bill (Pro) Number ..... Original Car Number and Initial .....  
 Name and address of consignee (Whom shipped to) .....  
 If shipment reconsigned enroute, state particulars .....

**DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED.**

(Number and description of articles, nature and extent of loss or damage, invoice price of articles, amount of claim, etc.)

Total Amount Claimed	

**IN ADDITION TO THE INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM:**

☐ 1 Original bill of lading, if not previously surrendered to carrier  
☐ 2 Original paid freight ("expense") bill  
☐ 3 Original invoice or certified copy  
☐ 4 Other particulars obtainable in proof of loss or damage claimed

Remarks .....

The foregoing statement of facts is hereby certified to as correct

.....  
 (Signature of claimant)

1 Claimant should assign to each claim a number, inserting same in the space provided at the upper right hand corner of this form. Reference should be made thereto in all correspondence pertaining to this claim.  
 2 Claimant will please place check (x) before such of the documents mentioned as have been attached, and explain under "Remarks" the absence of any of the documents called for in connection with this claim. When for any reason it is impossible for claimant to produce original bill of lading, if required or paid freight bill, claimant should indemnify carrier as per clause against duplicate claim supported by original documents.

(Name of Carrier)

**TO CLAIMANTS:**

Persons presenting claims to a carrier will expedite settlement by furnishing the carrier with a complete and detailed statement of all pertinent facts tending to establish the validity of their claims. It is the desire of carrier to settle promptly all valid claims, and the frank and hearty co-operation of the claimant is therefore solicited. Delayed settlement of claims is frequently due to the failure of the claimant to furnish carrier with the necessary information and documents with which to make investigation and establish liability promptly. It should be borne in mind that carriers under the terms of the Act to Regulate Commerce are required to thoroughly investigate each claim before payment. Claimants should, therefore, in every case furnish the carrier, as far as possible, with the information and documents called for on the other side of this form, even though there may be instances when it appears to the claimant that the information called for is more than necessary to establish the validity of the claim. There are claims, e. g., for concealed loss and damage, in connection with which it may be necessary to call for additional information from the claimant before making settlement.

Claimants are requested to make use of this form for filing claims with carriers. Claims may be filed with the carrier's agent either at the point of origin or destination of shipment, or direct with the Claim Department of the carrier, and will be considered properly presented only when the information and documents called for on the other side of this form have, as far as possible, been supplied. A duplicate copy thereof should be preserved by claimant.

Claimants should read carefully the information appearing below.

(In charge of Loss and Damage Claims).  
**IMPORTANT INFORMATION TO CLAIMANTS RESPECTING LOSS AND DAMAGE CLAIMS**  
Before presenting a claim on account of loss and damage, the following important information respecting claims should be given careful consideration.

1. The terms under which property is accepted and transported by a carrier are stated on the bill of lading issued by the carrier; also in tariffs and classifications issued or subscribed to by the carrier. Persons intending to file claims should, before doing so, examine the terms and conditions under which property was accepted and transported. If any part of the shipment in question was subject to the Regulations for the Transportation of Explosives and Other Dangerous Articles, prescribed by the Interstate Commerce Commission, pursuant to Acts of Congress, the person filing the claim should know that all of these regulations applicable to the shipment had been complied with.

2. Carriers and their agents are bound by the provisions of law, and any deviation therefrom by the payment of claims before the facts and measure of legal liability are established will render them, as well as the claimant, liable to the fines and penalties by law. Attention is called to the following extract from Interstate Commerce Commission Conference Ruling No. 68:

"It is not the proper practice for railroad companies to adjust claims immediately on presentation and without investigation. The fact that shippers may give bond to secure repayment in case, upon subsequent examination, the claims prove to have been improperly adjusted, does not justify the practice."

3. In order that the carrier may have an opportunity to inspect goods and thereby properly verify claims, any loss or damage discovered after delivery should be reported to the agent of the delivering line, as far as possible, immediately upon discovery, or within forty-eight hours after receipt of goods by consignee.

4. Under the provisions of the 6th section of the Act to Regulate Commerce, it is unlawful for a carrier to charge or demand or collect or receive, any greater or less or different compensation for the transportation of property than the rates and charges named in tariffs lawfully on file, nor to refund or remit in any manner or by any device any portion of the rates and charges so specified. The refund or remission of any portion of the rates and charges so specified based on the ground that the carrier has computed its charges on excessive weight or wrong classification is as much a violation of the law as is a direct concession or departure from the published rates and charges. In this connection, attention is also called to the following important quotation from section 10 of the Act to Regulate Commerce.

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

"Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation or of agreement to transport such property whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons."

## Standard Form for Presentation of Overcharge Claims.

APPROVED BY  
THE INTERSTATE COMMERCE COMMISSION  
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE  
THE FREIGHT CLAIM ASSOCIATION

(Name of person to whom claim is presented) _____ (Address of claimant) _____ (Name of carrier) _____ (Date) _____ Address _____		(Claimant's Number) 1  (Carrier's Number)				
This claim for \$_____ is made against the carrier named above by _____ for Overcharge in connection with the following described shipments: _____ (Name of claimant)						
Description of shipment _____ Name and address of consignor (shipper) _____ Shipped from _____ (City, town or station) To _____ (City, town or station) Final Destination _____ (City, town or station) Routed via _____ Bill of Lading issued by _____ Co., Date of Bill of Lading _____ Paid Freight Bill (Pro) Number _____ Original Car Number and Initial _____ Name and address of consignee (Whom shipped to) _____ If Shipment reconsigned enroute, state particulars _____ Nature of Overcharge _____ (Weight, rate or classification, etc.)						
<b>DETAILED STATEMENT OF CLAIM.</b>						
Charges Paid	No. of Pgs.	Articles	Weight	Rate	Charges	Total
		Total				
Should have been		Total				
		Overcharge				
Authority for rate claimed _____ Authority for classification claimed _____ Note—In the two spaces provided next above give, so far as practicable, Tariff reference (I. C. C. number, effective date and page or item)						
<b>IN ADDITION TO THE INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.<sup>2</sup></b>						
<input type="checkbox"/> 1 Original paid freight ("expense") bill <input type="checkbox"/> 2 Original invoice, or certified copy, when claim is based on weight or valuation, or when shipment has been improperly described <input type="checkbox"/> 3 Original bill of lading, if not previously surrendered to carrier, when shipment was prepaid, or when claim is based on misrouting or valuation <input type="checkbox"/> 4 Weight certificate or certified statement when claim is based on weight. <input type="checkbox"/> 5 Other particulars obtainable in proof of Overcharge claimed: <sup>3</sup>						
Remarks _____ _____ _____						
The foregoing statement of facts is hereby certified to as correct.						
(Signature of claimant.) _____						
<sup>1</sup> Claimant should assign to each claim a number, inserting same in the space provided at the upper right hand corner of this form. Reference should be made thereto in all correspondence pertaining to this claim. <sup>2</sup> Claimant will please place check (x) before such of the documents mentioned as have been attached, and explain under "Remarks" the absence of any of the documents called for in connection with this claim. When for any reason it is impossible for claimant to produce original bill of lading, if required, or paid freight bill, claimant should indemnify carrier or carriers against duplicate claim supported by original documents. <sup>3</sup> Claims for overcharge on shipments of lumber should also be supported by a statement of the number of feet, dimensions, kind of lumber, and length of time on sticks before being shipped. Claims based on rates quoted in letters from traffic officials should be supported by the original or copies of such letters.						

(Name of Carrier)

#### TO CLAIMANTS:

Persons presenting claims to a carrier will expedite settlement by furnishing the carrier with a complete and detailed statement of all pertinent facts tending to establish the validity of their claims. It is the desire of carrier to settle promptly all valid claims, and the frank and hearty co-operation of the claimant is therefore solicited. Delayed settlement of claims is frequently due to the failure of the claimant to furnish carrier with the necessary information and documents with which to make investigation and establish liability promptly. It should be borne in mind that carriers under the terms of the Act to Regulate Commerce are required to thoroughly investigate each claim before payment. Claimants should, therefore, in every case furnish the carrier, as far as possible, with the information and documents called for on the other side of this form, even though there may be instances when it appears to the claimant that the information called for is more than necessary to establish the validity of the claim. There are claims, e. g., for concealed loss and damage, in connection with which it may be necessary to call for additional information from the claimant before making settlement.

Claimants are requested to make use of this form for filing claims with carriers. Claims may be filed with the carrier's agent either at the point of origin or destination of shipment, or direct with the Claim Department of the carrier, and will be considered properly presented only when the information and documents called for on the other side of this form have, as far as possible, been supplied. A duplicate copy thereof should be preserved by claimant.

Claimants should read carefully the information appearing below.

(In charge of Overcharge Claims)

#### IMPORTANT INFORMATION TO CLAIMANTS RESPECTING OVERCHARGE CLAIMS

Before presenting a claim on account of Overcharge, the following important information respecting claims should be given careful consideration.

1. The terms under which property is accepted and transported by a carrier are stated on the bill of lading issued by the carrier; also in tariffs and classifications issued or subscribed to by the carrier. Persons intending to file claims should, before doing so, examine the terms and conditions under which property was accepted and transported. If any part of the shipment in question was subject to the Regulations for the Transportation of Explosives and Other Dangerous Articles, prescribed by the Interstate Commerce Commission, pursuant to Acts of Congress, the person filing the claim should know that all of these regulations applicable to the shipment had been complied with.

2. Carriers and their agents are bound by the provisions of law, and any deviation therefrom by the payment of claims before the facts and measure of legal liability are established will render them, as well as the claimant, liable to the fines and penalties by law. Attention is called to the following extract from Interstate Commerce Commission Conference Ruling No. 68:

"It is not the proper practice for railroad companies to adjust claims immediately on presentation and without investigation. The fact that shippers may give bond to secure repayment in case, upon subsequent examination, the claims prove to have been improperly adjusted, does not justify the practice."

3. Pending the settlement of any dispute or disagreement between the consignee and the carrier as to question of overcharge in connection with property transported, the consignee may avoid a possible accrual of demurrage or storage charges, as well as other loss or damage, by promptly accepting the property from the carrier. Such action on his part in no way affects any valid claim which may exist against the carrier.

4. Under the provisions of the 6th section of the Act to Regulate Commerce, it is unlawful for a carrier to charge or demand or collect or receive, any greater or less or different compensation for the transportation of property than the rates and charges named in tariffs lawfully on file, nor to refund or remit in any manner or by any device any portion of the rates and charges so specified. The refund or remission of any portion of the rates and charges so specified based on the ground that the carrier has computed its charges on excessive weight or wrong classification is as much a violation of the law as is a direct concession or departure from the published rates and charges. In this connection, attention is also called to the following important quotation from section 10 of the Act to Regulate Commerce.

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court for each offense."

"Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement, or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation or of agreement to transport such property whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons."

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